DOCKET

No. 07-312
Title: Florida Department of Revenue, Petitioner
v.
Piccadilly Cafeterias, Inc.
Docketed: September 10, 2007
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (06-13759)
Decision Date: April 18, 2007
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jun 19 2007	Application (06A1220) to extend the time to file a petition for a writ of certiorari from July 17, 2007 to August 31, 2007, submitted to Justice Thomas.
Jun 26 2007	Application (06A1220) granted by Justice Thomas extending the time to file until August 31, 2007.
Aug 30 2007	Petition for a writ of certiorari filed. (Response due October 10, 2007)
Oct 4 2007	Order extending time to file response to petition to and including November 9, 2007.
Nov 9 2007	Brief of respondent Piccadilly Cafeterias, Inc. in opposition filed.
Nov 9 2007	Brief amici curiae of Illinois, et al. filed.
Nov 19 2007	Reply of petitioner Florida Department of Revenue filed. (Distributed)
Nov 20 2007	DISTRIBUTED for Conference of December 7, 2007.
Dec 7 2007	Petition GRANTED.
Jan 8 2008	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for the petitioner.
Jan 8 2008	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for the respondent.
Jan 22 2008	SET FOR ARGUMENT ON Wednesday, March 26, 2008.
Jan 22 2008	Joint appendix filed.
Jan 22 2008	Brief of petitioner Florida Department of Revenue filed.
Jan 28 2008	CIRCULATED.
Jan 29 2008	Brief amici curiae of International City/County Management Association, et al. filed. (Distributed) .
Jan 29 2008	Brief amici curiae of Illinois, et al. filed. (Distributed)
Feb 6 2008	Record received from the U.S.C.A. for the 11th Circuit. (1 envelope)
Feb 8 2008	Record received from the U.S.D.c. for the Northern District of Florida. (1 box)
Feb 20 2008	Brief amici curiae of Professors Richard Aaron, et al. filed. (Distributed)
Feb 21 2008	Brief of respondent Piccadilly Cafeterias, Inc. filed.
Mar 17 2008	Reply of petitioner Florida Department of Revenue filed. (Distributed)
Mar 26 2008	Argued. For petitioner: Scott D. Makar, Solicitor General, Tallahassee, Fla. For respondent: G. Eric Brunstad, Jr., Hartford, Conn.

PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Petitioner,

v.

PICCADILLY CAFETERIAS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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August 31, 2007

QUESTION PRESENTED

Whether section 1146(a) of the Bankruptcy Code, which exempts from stamp or similar taxes any asset transfer "under a plan confirmed under section 1129 of the Code," applies to transfers of assets occurring prior to the actual confirmation of such a plan?

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceedings in the court whose judgment is sought to be reviewed are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, State of Florida, on behalf of the Department of Revenue, State of Florida, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 484 F.3d 1299 and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a-9a. The final summary judgment and opinion of the bankruptcy court granting summary judgment in favor of respondent Piccadilly are unreported and are reproduced at Pet. App. 31a-41a. The opinion of the district court affirming the bankruptcy court is unreported and is reproduced at Pet. App. 10a-30a.

JURISDICTION

The judgment of the Eleventh Circuit was entered on April 18, 2007. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

11 U.S.C. § 1146(a) (previously 1146(c)) of the Bankruptcy Code, entitled "Special Tax Provisions" and which is reproduced in the appendix, states:

> (a) The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

Pet. App. 42a.

STATEMENT

Section 1146(c) (now 1146(a))[1] of the Bankruptcy Code allows debtors in bankruptcy to avoid the imposition of "stamp" or "other similar" taxes on the sale of their property if done "under a plan confirmed" pursuant to Chapter 11 of the Code. This statutory authority provides a strategic means of avoiding such taxes, provided the asset transfers are "under a plan confirmed" by a bankruptcy court, whose authority to grant the tax exemption is set forth in the Code.

Section 1146(c) provides this tax relief for two reasons: to assist in the implementation of confirmed plans that provide for sales of the debtor's assets and to relieve the debtor from taxes thereby providing a potential benefit to other creditors. On the other hand, state governments are entitled to collect revenues from stamp and other similar taxes on debtors' property unless the statutory requirements of section 1146(c) are met, particularly the requirement that the exemption be triggered only "under a plan confirmed" under the Code. State governments therefore have a strong interest in ensuring that the tax exemption is applied in a uniform, non-arbitrary way that does not expand the exemption beyond its limited parameters.[2]

The tax exemption authorized in section 1146(c), however, is not being applied in a uniform way across the country. The courts of appeals are sharply divided on the meaning of the phrase "under a plan confirmed" as used in section 1146(c), resulting in wide disparities and arbitrariness

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[1] Newly renumbered section 1146(a) will be referred to herein as section 1146(c), both of which have identical language. Pet. App. 42a.

[2] While this case does not directly involve efforts to expand the section 1146(c) exemption beyond the stamp tax, debtors frequently seek to do so. Moreover, while the stamp tax is often less than one percent in a given bankruptcy case, the aggregate financial impact of the Eleventh Circuit's interpretation of the exemption is significant.

in its application nationwide. *See* Pet. App. 5a-9a. Two courts of appeals have applied the plain meaning of this phrase, finding a bright line temporal test and holding that the tax exemption does not apply to transfers made prior to confirmation of a plan. *See id.* The Eleventh Circuit takes a sharply different view of the phrase, however, holding that the tax exemption may apply to some asset transfers, undefined by section 1146(c), that occurred prior to the existence of a confirmed plan. *See* Pet. App. 9a. A Second Circuit decision, while not ruling on the temporal application of the statute, has taken a position that both sides in the debate have cited as being consistent with their respective views, further exacerbating the confusion.

These two positions, relating to the temporal application of section 1146(c), create a clear and irreconcilable conflict. Indeed, the Eleventh Circuit has taken the most extreme position to date by extending the tax exemption to asset transfers – such as the one at issue – which are undefined by the language of section 1146(c) and can occur at the very commencement of the bankruptcy case, well before a plan is even proposed, much less confirmed.

A. Statutory Background.

Congress has long recognized that certain tax exemptions can be effective in assisting reorganization plans confirmed under the bankruptcy laws. The predecessor of section 1146(c) was first added to the Bankruptcy Act of 1898 in section 77(B)(f) of the Bankruptcy Act amendments of 1934. It exempted "the issuance, transfers, or exchanges of securities or making or delivery of conveyances to make effective any plan of reorganization confirmed under the provisions of this section" from federal stamp taxes. *See* 11 U.S.C. § 207(f) (repealed 1938). Four years later, Congress amended the Act by expanding the exemption to *state* and federal taxes on securities or transfers under a confirmed chapter X plan. *See* 11 U.S.C. § 667 (1938, repealed 1978);

see also In re New York, N.H. & H.R. Co., 95 F.2d 483 (2d Cir. 1938).

The current language states that the "issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax." 11 U.S.C. § 1146(a). This language has not been altered since 1938. Congress has had the opportunity to amend the language on a number of occasions when it enacted major revisions to the Bankruptcy Code in 1938, 1978 and 1984. Notably, Congress had a recent opportunity to amend the language of section 1146(c) in its major revision of the Bankruptcy Code in 2005 but, instead, merely renumbered it as section 1146(a).

B. Factual Background.

On October 28, 2003, Piccadilly Cafeterias, Inc. ("Piccadilly") executed an asset purchase agreement with Piccadilly Acquisition Corporation ("PAC"). PAC agreed to purchase all of Piccadilly's assets for $54 million. One day later, on October 29, 2003, Piccadilly filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code.

At the same time, Piccadilly also filed a motion pursuant to 11 U.S.C. § 363(b)(1), requesting authorization to sell substantially all of its assets outside of the ordinary course of business. Piccadilly also requested an exemption from stamp taxes on the asset sale pursuant to 11 U.S.C. § 1146(c). The Department of Revenue objected to both of Piccadilly's requests.

On December 4, 2003, upon request by Piccadilly, the bankruptcy court approved an auction through which the highest bidder would be entitled to purchase Piccadilly's assets. The winning bid of $80 million was from Piccadilly Investments, Inc. On January 24, 2004, Piccadilly and a committee of senior secured note holders, along with a

committee of unsecured creditors, entered into a global settlement, setting the priority of distribution among Piccadilly's creditors.

On February 13, 2004, the bankruptcy court approved the sale of Piccadilly's assets to Piccadilly Investments. The court further held that the $80 million sale to Piccadilly Investments was exempt from stamp taxes under 11 U.S.C. § 1146(c), even though the sale was made prior to the global settlement, prior to any plan confirmation, and pursuant to the court's authority under section 363 and not its authority under Chapter 11 to confirm a plan. At the same time, the court approved the global settlement. The Department of Revenue moved to reconsider, vacate and/or amend the sale order. The motion was denied by the bankruptcy court. The sale of Piccadilly's assets closed on March 16, 2004.

Piccadilly then filed a plan of liquidation in Chapter 11 on March 26, 2004. It later filed an amended plan. The plan did not provide for any form of reorganization of Piccadilly, but merely provided for distribution of Piccadilly's assets in accordance with the terms of the global settlement. The Department of Revenue then commenced the adversary action at issue here, filing an objection to the plan along with a complaint against Piccadilly seeking a declaration that its pre-confirmation stamp taxes in the amount of $32,200 were not exempt under 11 U.S.C. § 1146(c). The bankruptcy court nonetheless confirmed the amended plan on October 21, 2004. The court denied the Department's motion to reconsider the confirmation order. The Department then amended its complaint against Piccadilly, and both parties filed motions for summary judgment on the issue of stamp taxes.

C. Proceedings Below.

1. *The Bankruptcy and District Courts.* The bankruptcy court, and the district court on appeal, both held that section 1146(c) should be read to allow a tax exemption for pre-confirmation transfers. The bankruptcy court held a hearing

and ruled in favor of Piccadilly on summary judgment, holding that the pre-confirmation asset sale was exempt from stamp taxes pursuant to 11 U.S.C. § 1146(c). According to the bankruptcy court, even though the sale occurred prior to plan confirmation, the sale of substantially all of Piccadilly's assets was still a transfer "under" its ultimately confirmed plan of reorganization because the sale was necessary to consummate the plan. Pet App. 40a-41a. The district court affirmed the bankruptcy court's implicit conclusion that the exemption can apply even when a transfer is made prior to confirmation of a reorganization plan.[3] Pet App. 29a.

2, *The Eleventh Circuit.* The court of appeals agreed and affirmed. Pet. App. 1a-9a. The court agreed with the district court that pre-confirmation transfers may constitute transfers "under a plan confirmed" pursuant to 11 U.S.C. § 1146(c).

After acknowledging that the precise issue was one of first impression in the Eleventh Circuit, the court expressly disagreed with the Third and Fourth Circuits, both of which had previously held that the exemption in section 1146(c) may *not* apply to pre-confirmation transfers of assets, such as the one in this case. Instead, the panel sided with the statutory interpretation found in a "somewhat similar" Eleventh Circuit case, as well as the reasoning of the Second Circuit in an "analogous" case involving section 1146(c), both of which held that the language "under a plan" refers to transfers that are "necessary to the consummation of a confirmed Chapter 11 plan."[4] Pet App. 6a.

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[3] The district court noted that the issue of the specific sale of Piccadilly's assets and the application of 11 U.S.C. § 1146(c) was not before it. Instead, the district court focused on whether the exemption for stamp taxes may ever apply to asset transfers completed before confirmation of a plan, which is the issue to be decided in this case.

[4] As explained below, the two cases that the Eleventh Circuit relied upon are distinguishable from those of the Third and Fourth Circuits as well as (Continued ...)

In this case, the Eleventh Circuit went even further. It held that the language "under a plan" is not bound by any temporal limitation, but instead section 1146(c)'s tax exemption may apply to *all* "pre-confirmation transfers that are necessary to the consummation" of an ultimately confirmed plan of reorganization. In other words, as long as a Chapter 11 plan is confirmed at some point in the future, and the pre-confirmation transfer was "necessary to the consummation" of that eventually confirmed plan, the Eleventh Circuit held that it does not matter that the plan *did not even exist* at the time of the transfer. As long as the pre-confirmation transfer was necessary, it may be considered "under" the later confirmed plan for purposes of the statute's stamp tax exemption.[5]

REASONS FOR GRANTING THE PETITION

This Court should grant this petition and resolve the existing circuit split over the meaning of section 1146(c) of the Bankruptcy Code, which exempts from stamp or similar taxes any asset transfer "under a plan confirmed under section 1129" of the Code.

Two circuits, the Third and Fourth Circuits, hold that the plain language of section 1146(c) only permits tax exemptions for transfers of assets occurring *after* a plan has been confirmed under section 1129 of the Bankruptcy Code. These circuits apply the statute's plain meaning, construing it to mean that a bankruptcy court may *not* retroactively approve tax exemptions for transfers of assets completed months or years prior to the plan's actual confirmation.

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this case because they involved asset transfers under *confirmed* reorganization plans thereby distinguishing them from the instant facts.

[5] Like the district court, the Eleventh Circuit noted that the parties had not briefed the issue of whether the section 1146(c) tax exemption was applicable to the asset sale in Piccadilly's particular case.

The Eleventh Circuit, however, holds that section 1146(c) applies to any transfer of assets, even those occurring months or years prior to the actual confirmation of a plan. By removing any requirement that the plan actually be confirmed, it expands the statute in such a boundless manner that it can apply to virtually any transaction in the case, regardless of when it occurred. In short, the statutory requirement that there be "a plan confirmed" becomes of little consequence, so long as a bankruptcy court eventually confirms a plan. The Eleventh Circuit's ruling warrants review because it squarely conflicts with decisions of other courts of appeals in a way that results in irreconcilable and arbitrary results.

It is important for the States to be able to determine the effect of the bankruptcy on their revenues and for other parties to know with certainty when a transaction will or will not be subject to this particular, albeit limited, tax. The test used by the Eleventh Circuit, and other lower courts that agree with it, introduces a high degree of uncertainty into the equation and ensures that the issue will need to be litigated in virtually every situation. Moreover, the Eleventh Circuit's ruling contravenes the plain language of section 1146(c), which both the Third and Fourth Circuits viewed as paramount.

It is important to note that Congress has had opportunities on many occasions to alter or create more specificity in the language of section 1146(c), but opted not to do so. Significantly, Congress' most recent opportunity came in 2005, *after* the decisions in the Third and Fourth Circuits were handed down. In passing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,[6] Congress chose only to renumber the Code sections, renumbering section 1146(c) as 1146(a), leaving the statute's plain language and meaning unchanged.

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[6] *See* Pub. L. No. 109-8, 119 Stat. 23 (effective October 17, 2005).

Lastly, the Eleventh Circuit's ruling that section 1146(c) may apply to pre-confirmation transfers, even those that occurred prior to the existence of any reorganization plan, has resulted in recurring abuses of the limited state tax exemption granted by Congress in section 1146(c). These abuses have become increasingly aggressive as parties are seeking exemptions from taxation for any and all transfers, well prior to the time those parties have proposed or formulated a plan of reorganization, as contemplated by the statute. This Court should resolve the issue of the limited applicability of section 1146(c) and the importance of applying the clear, unambiguous, and limited language of the exemption to prevent further abuse.

I. THE DECISION BELOW CREATES A CLEAR CIRCUIT SPLIT REGARDING THE AVAILABILITY OF TAX EXEMPTIONS UNDER SECTION 1146(C) OF THE BANKRUPTCY CODE.

The Eleventh Circuit's decision creates a clear and unmistakable circuit split regarding the applicability of 11 U.S.C. § 1146(c)'s tax exemption for transfers of assets made prior to the confirmation of a Chapter 11 plan. As discussed below, not only did the Eleventh Circuit disagree with the well-reasoned decisions of the Third and Fourth Circuits, it chose to apply two inapplicable and clearly distinguishable cases, resulting in a holding that stretches section 1146(c) well beyond its outer bounds.

1. *The Fourth Circuit.* The Fourth Circuit was the first court of appeals to squarely address the issue in this case. In 1999, the court addressed whether a home builder's pre-confirmation real property transfers, occurring during the period in which it was a Chapter 11 debtor but more than a year before confirmation of a reorganization plan, were exempt from transfer and recordation taxes under 11 U.S.C. § 1146(c). *See In re NVR Homes,* 189 F.3d 442, 447 (4th Cir. 1999). The court explicitly held that the debtor's pre-

confirmation transfers of real estate could not be considered "under a plan" for purposes of section 1146(c)'s exemption provision. *See id.* at 458.

The Fourth Circuit expressly rejected the contention that section 1146(c)'s "under a plan confirmed" language encompasses all transfers that are "essential to the confirmation of a plan." *Id.* at 456-57. The court explained that such a broad contention is "fundamentally flawed" because it "makes a plan's terms the master of § 1146(c), instead of deferring to the statute itself." *Id.* at 456. The court held that the statute itself exclusively controls the extent of its own operation, and the language of section 1146(c) is "plain and requires no great manipulation to interpret its terms." *Id.* at 456-57.

In interpreting the statute, the Fourth Circuit noted that this Court has held that statutes granting immunity from state taxation must be interpreted narrowly in favor of the state, otherwise private parties would "fervently pursue every possible tax advantage," even though not expressly given by Congress. *Id.* at 457 (*citing California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 851-52 (1989)). In light of this principle, the court of appeals concluded that the plain language of section 1146(c), using the ordinary understanding of the words "under a plan confirmed," rejected the statute's application to transfers occurring prior to the existence of a confirmed reorganization plan. *See id.* at 457.

Although a plan was eventually "confirmed" under the statute, the Fourth Circuit reasoned that the word "under" does not include pre-confirmation transfers. *See id.* Turning to the meaning of the word "under" as found in a standard dictionary as well as *Black's Law Dictionary*, the court stated that the word "under" would ordinarily be understood to mean "inferior or subordinate," or "[w]ith the authorization of." *Id.* (internal quotation marks omitted). The court of appeals therefore concluded that logically, under the plain language of

section 1146(c), "we cannot say that a transfer made prior to the date of plan confirmation could be subordinate to, or authorized by, something that did not exist at the date of transfer – a plan confirmed by the court." *Id.*

In conclusion, the Fourth Circuit reasoned that the plain language of the statute reflects a balance struck by Congress. The statute entitles the debtor to relief from certain state taxation to facilitate the implementation of a *confirmed* reorganization plan, while preventing federal interference with state taxation before a debtor reaches the point of plan confirmation. *See id.* at 458.

2. *The Third Circuit.* The second court of appeals to directly deal with section 1146(c)'s potential application to pre-confirmation transfers was the Third Circuit. Like the situation in *NVR Homes*, the Third Circuit addressed a Chapter 11 debtor's claim that the proposed sale of real estate interests in aid of the plan confirmation process, but prior to the actual confirmation of a plan, should be exempt from state recording and transfer taxes. *See In re Hechinger Investment Company of Delaware, Inc.*, 335 F.3d 243, 246-47 (3d Cir. 2003). In an opinion written by Circuit Judge Alito, the Third Circuit expressly agreed with the reasoning and holding of the Fourth Circuit in *NVR Homes* that section 1146(c) does not apply to real estate transactions that occur prior to the confirmation of a plan under Chapter 11. *See id.* at 256-57.

The Third Circuit reasoned that the "most natural" reading of the "under a plan confirmed" language in the statute is to require that a transfer be "authorized" by a plan. *Id.* at 252. Judge Alito wrote that "[w]hen an action is said to be taken 'under' a provision of law or a document having legal effect, what is generally meant is that the action is 'authorized' by the provision of law or legal document." *Id.* As examples, if claims are made "under" federal statutes or rules such as 42 U.S.C. § 1983 or Federal Rule of Civil Procedure 12(b)(6), that means those laws or rules provide the authority to bring the claims in the first place. *See id.* Similarly, the court

explained, if a transfer is made "under" a plan as contemplated by section 1146(c), the plan itself must provide the authority for the transfer. *See id.* If a plan is not confirmed at the time of the transfers, then the plan cannot provide the authority for the transfers, and the state tax exemption cannot apply. *See id.*

The Third Circuit also noted two other reasons for interpreting the "under a plan confirmed" language of the exemption to mean "authorized by" a plan. First, the court pointed out that the word "under" appears three times in the same sentence in section 1146(c), and as such interpreting that word to mean "authorized by" or "pursuant to the authority conferred by" a plan would give the term "under" a "single, consistent meaning throughout Section 1146(c)." *Id.* at 253. The court therefore adhered to the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Id.* (*quoting Sorenson v. Sec. of the Treasury*, 475 U.S. 851, 860 (1986)) (citations and internal quotations omitted). Second, the court noted that the identical phrase "under a plan confirmed" appears in another provision of the Bankruptcy Code, 11 U.S.C. § 365(g), and in that section the phrase means "a plan that is confirmed pursuant to the authority conferred" by other sections of the Code. *Id.* at 254. Thus, the Third Circuit's interpretation of section 1146(c) would be consistent with the remainder of the Bankruptcy Code.

Similar to the Fourth Circuit's reasoning in *NVR Homes,* the Third Circuit concluded that the language of section 1146(c) is not ambiguous and can be given its clear and natural meaning. Moreover, both courts held that even if its language were ambiguous, section 1146(c)'s tax exemption provisions must be construed narrowly in favor of the state to prevent unwarranted federal interference. *See id.* Thus, both the Fourth and Third Circuits hold that pre-confirmation transfers are not authorized by a plan that does not yet exist, and as such are not entitled to tax exemptions under section 1146(c).

3. *The Second Circuit.* It has been argued that the Second Circuit has addressed the application of section 1146(c) to pre-confirmation transfers such as the instant case. Upon closer inspection, however, it becomes apparent that the Second Circuit's decision is distinguishable and only adds further confusion to the existing circuit split, thereby providing additional justification for this Court's review.

The Eleventh Circuit here, and the debtors in the Fourth and Third Circuit cases discussed above, each relied on *In re Jacoby-Bender*, 758 F.2d 840 (2d Cir. 1985), in support of their position that tax exemptions under 11 U.S.C. § 1146(c) may apply to asset transfers occurring prior to the confirmation of a reorganization plan. In *Jacoby-Bender*, however, the Second Circuit addressed whether a transfer made *after* confirmation of a plan, but not specifically referred to by the previously-approved plan, could still be considered "under a plan confirmed" as required by section 1146(c). *See id.* at 841. Under this distinguishable fact pattern, the Second Circuit concluded that a specific transfer of assets takes place "under a plan confirmed" as long as the transfer "is necessary to the *consummation* of a plan." *Id.* at 842 (emphasis added).

It is important to note that the Second Circuit was reviewing a *confirmed* plan, holding that it was clear that the plan was almost entirely premised on the sale of the building at issue. The city's primary objection was merely that the references in the confirmed plan to such a sale were not sufficiently specific. The court held that there was no reason to require such detail in the plan and rejected the city's readings of the statutory language. Nothing in the opinion, however, deals with or even suggests that a transfer *prior to confirmation* would have been covered. In fact, the bankruptcy court previously *denied* the debtor's effort to obtain an earlier ruling on the application of section 1146(c) at a time prior to the date the plan was confirmed. *See In re Jacoby-Bender, Inc.*, 34 B.R. 60, 62 (Bankr. S.D.N.Y. 1983).

The Fourth and Third Circuits in *NVR Homes* and *Hechinger*, however, have explicitly held that *Jacoby-Bender* is both distinguishable and inapplicable to cases where the debtor is claiming tax relief for transfers made *prior* to the existence or confirmation of a plan. The Fourth Circuit in *NVR Homes* noted that the "succinct issue" presented in *Jacoby-Bender* was "whether the *confirmed* reorganization plan encompassed the property sale" made after confirmation, and as such section 1146(c) may apply. 189 F.3d at 455 (emphasis added). In other words, the Second Circuit was only interpreting the reach of an existing confirmed plan, not a pre-confirmation transfer. *See id.*

The Fourth Circuit noted that, despite the clear indication of the limited nature of the issue before the Second Circuit in *Jacoby-Bender*, lower courts quickly began to extend its language and holding to apply not only to post-confirmation transfers "necessary to the *consummation* of a plan," but also to pre-confirmation transfers deemed "necessary to the *confirmation* of a plan." *Id.* at 456. As such, lower courts began to use the Second Circuit's decision to interpret the limits of section 1146(c) itself, as opposed to just the interpretation of a confirmed plan's provisions, as the Second Circuit had done in *Jacoby-Bender*.[7] This stretching of the Second Circuit's holding led to decisions allowing pre-confirmation transfers to fall within the statute's requirements for tax exemptions, as long as the transfers were necessary to the eventual confirmation of a plan. *See id.* And, since a plan of reorganization generally cannot be confirmed unless the debtor successfully operates during its term, this arguably means that every transaction during the case is "necessary" to the plan's confirmation, thus making the statutory language meaningless. As a result, the Second Circuit's decision has

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[7] *See, e.g., In re Lopez Dev., Inc.*, 154 B.R. 607, 609 (Bankr. S.D. Fla. 1993); *In re Permar Provisions, Inc.*, 79 B.R. 530, 534 (Bankr. E.D.N.Y. 1987); *In re Smoss Enter. Corp.*, 54 B.R. 950, 951 (Bankr. E.D.N.Y. 1985).

caused significant confusion among debtors, creditors, and lower courts.

The Third Circuit in *Hechinger* noted this confusion in rejecting the debtor's argument that *Jacoby-Bender's* analysis applied to its pre-confirmation sales of real estate interests. *See Hechinger*, 335 F.3d at 255. Judge Alito agreed with the Fourth Circuit that "[t]he *Jacoby-Bender* decision thus resolved the issue of whether the sale was authorized by the terms of the *previously* confirmed plan, not whether the sale was necessary to achieving the plan's confirmation." *Id.* (emphasis added). In so ruling, the Third Circuit reversed the decisions of both the district court and the bankruptcy court below, which had adopted the broad ruling espoused by the debtor as supporting tax exemptions for sales interests occurring prior to the adoption of a plan. *See id.* at 255-56.

In short, while the Second Circuit's decision is clearly distinguishable and not part of any direct conflict on the specific issue presented herein, the opinion has caused significant confusion as to its application. This confusion ultimately contributed to the circuit split that arose when the Eleventh Circuit issued its opinion in this case.

4. *The Eleventh Circuit.* In rejecting the decisions of the Fourth and Third Circuits in *NVR Homes* and *Hechinger*, respectively, the Eleventh Circuit created a clear split among the circuits on the issue of tax exemptions for pre-confirmation transfers under 11 U.S.C. § 1146(c). Indeed, the Eleventh Circuit's decision stretches section 1146(c) well beyond its statutory language by extending tax exemptions to almost any transfer of assets, even those occurring months or years prior to the existence of an actual confirmation plan.

Notably, the Eleventh Circuit relied upon its decision in *T.H. Orlando* in stating that section 1146(c)'s "under a plan confirmed" language "refers to a transfer authorized by a confirmed Chapter 11 plan," which in turn means "any transfer that is necessary to the *consummation* of the plan."

See Pet. App. 6a (*citing In re T.H. Orlando Ltd.*, 391 F.3d 1287, 1291 (11th Cir. 2004) (emphasis added). In other words, the Eleventh Circuit expanded section 1146(c)'s language beyond transfers authorized under *confirmed* plans to transfers that are later deemed "necessary to the *consummation* of a plan" – a far broader concept than set forth in the statute.

Ironically, the Eleventh Circuit in *T.H. Orlando* had explicitly *agreed* with the statutory interpretations in both *NVR Homes* and *Hechinger*, reasoning that "under a plan" refers to transfers that are "necessary to the consummation of a *confirmed* plan." 391 F.3d at 1291 (emphasis added).[8] Nonetheless, the panel below held that the prior endorsement in *T.H. Orlando* of the "strict temporal interpretation" of the Third and Fourth Circuits was mere dicta. *See* Pet. App. 6a, fn.2. In rejecting that dicta, the panel below interpreted *T.H. Orlando* as merely involving a "somewhat similar issue" that guided its application of section 1146(c). *See* Pet. App. 6a.

The Eleventh Circuit panel also significantly relied on the Second Circuit's decision in *Jacoby-Bender* to justify its broad interpretation of the language of section 1146(c). In so doing, the panel read the "under a plan confirmed" language nearly out of the statute in holding that the tax exemption will apply to any asset transfer, regardless of when it occurred, as long as a plan is ultimately confirmed and the transfer is deemed necessary for the consummation of the confirmed plan. The language of section 1146(c) cannot justifiably be stretched so far. Given the polar extremes of the statutory interpretations of the Third and Fourth Circuits versus the

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[8] *T.H. Orlando* dealt with the scope of the transfers that could be authorized by a confirmed plan, and whether section 1146(c) could be read so broadly as to exempt transfers made by non-debtor parties, so long as those transfers were part of an interrelated transaction that would aid in the consummation of the debtor's plan. *See In re T.H. Orlando*, 391 F.3d at 1291-92. That analysis has its own issues, but is clearly a different issue than the one raised here.

Eleventh Circuit, this Court should grant review and resolve what has become a significant, irreconcilable circuit conflict resulting in a lack of uniformity on an important tax and bankruptcy issue.[9]

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[9] Commentators have recognized this clear and irreconcilable conflict among lower federal courts and the need for this Court to resolve it. *See, e.g.*, Paul D. Leake & Mark G. Douglas, *Charting The Evolution Of The Chapter 11 Transfer Tax Exemption: Different Subsection, Same Lack Of Clarity*, JNL. OF BANKR. L. 2007.06-4 (June 2007). Leake and Douglas have concluded that "there are no clear guidelines on the scope of the tax exemption" in curren section 1146(a). *Id.* They claim that this is because section 1146(a) "is ambiguous enough to invite competing interpretations concerning the types of sales that qualify for the tax exemption." *Id.* ("The increasing lack of certainty spawned by these rulings should act as a catalyst for Supreme court review of the issue."). This "widening rift" among lower courts and lack of clarity means this Court should "resolve the controversy." *Id.* ("With *Piccadilly Cafeterias*, the rift among the circuits is widening with little hope of resolution anytime soon."). Leak & Douglas further point out that the need for review is especially evident because, as previously noted, Congress failed to clarify the scope of the language of section 1146(c) when it simply renumbered the section as 1146(a) in its sweeping 2005 amendments to the Bankruptcy Code. *See id.* ("[T]he new bankruptcy legislation, which implemented the most sweeping reform of U.S. bankruptcy law in over a quarter-century, amended Section 1146 by eliminating subsections (a) and (b), but left the text of subsection (c) (now Section 1146(a)) unchanged."); *see also* Honorable Nancy C. Dreher, *Eleventh Circuit parts with the Third and Fourth Circuits and holds that the § 1146(c) exemption from state stamp taxes applies to preconfirmation sales*, BANKRUPTCY SERVICE CURRENT AWARENESS ALERT (June 2007); Paul D. Leake & Mark G. Douglas, *Testing the Limits of the Chapter 11 Transfer Tax Exemption: In Search of the Meaning of "Under a Plan Confirmed"*, 1 N.Y.U. J. L. & BUS. 839, 855 (Summer 2005); Walter C. Little, *Bankruptcy: In Re Webster Classic Auctions: Is the Door Finally Open for a Practical Application of § 1146(c)?*, 79 FLA. BAR J. 28 (December 2005); Karen Cordry, *The Incredible Expanding Section 1146(c)*, 21 AM. BANK. INST. J. 10 (Dec-Jan. 2003).

II. THE DECISION BELOW CONTRAVENES THE PLAIN LANGUAGE OF SECTION 1146(C), WHICH CONGRESS HAS NOT CHANGED SINCE 1938.

The existing circuit split alone warrants this Court's review, which is necessary to provide uniform nationwide guidance on the meaning of section 1146(c)'s language. Moreover, the Eleventh Circuit's interpretation of section 1146(c) cannot be reconciled with the plain language of that provision, which has remained unchanged for almost 70 years.

As the Fourth Circuit reasoned in *NVR Homes*, it is section 1146(c)'s plain meaning that is paramount; and, in determining the limits of that meaning, federal courts should be mindful that the terms of the exemption "should be construed narrowly in favor of the state." *NVR Homes,* 189 F.3d at 457. The Fourth Circuit correctly concluded that "Congress, by its plain language, intended to provide exemptions only to those transfers *reviewed and confirmed* by the court" as part of the plan process. *Id.* at 458 (emphasis added). Any other interpretation allows some future plan's terms to control the availability of the limited tax exemption, rather than the terms of the statute itself. *See id.* at 456.

As noted, the Third Circuit in *Hechinger* agreed with this reasoning, concluding that the "most natural" reading of the "under a plan confirmed" language in the statute is to require that a transfer be "authorized" by a plan. *See In re Hechinger*, 335 F.3d at 252. Judge Alito correctly reasoned that actions taken "under" a provision of law or a document having legal effect are actions "authorized" by the law or legal document, meaning the law or document provides the authority for the actions in the first place. *See id.* That means that if a plan for reorganization is not confirmed (or, as in this case, *did not even exist*) at the time of the transfers, then the plan cannot provide the authority for the transfers and the state tax exemption cannot apply. *See id.*

Notably, the language of section 1146(c) has not changed in almost 70 years. It is significant that Congress has had the opportunity to amend the language on several occasions when it enacted major revisions to the Bankruptcy Code in 1938, 1978, and 1984. Most recently, Congress had the opportunity to amend the language of section 1146(c) in its major revision of the Bankruptcy Code in 2005, well *after* the Fourth and Third Circuits gave their interpretation of the statute's applicability. Notably, this significant 2005 overhaul to the Bankruptcy Code was titled "The Bankruptcy Abuse Prevention and Consumer Protection Act." Rather than legislatively overruling the decision of the Fourth and Third Circuits in *NVR Homes* and *Hechinger*, respectively, Congress merely renumbered section 1146(c) as section 1146(a).

As courts have repeatedly noted, the Congressional intent underlying section 1146(c) was to grant certain limited state tax exemptions to assist in the implementation of reorganization plans confirmed under the bankruptcy laws. This Court should grant review to rectify the Eleventh Circuit's overbroad view of section 1146(c), an interpretation that contravenes the plain language of the statute and the intent of Congress as expressed in section 1146(c).

III. REVIEW IS WARRANTED BECAUSE OF THE INCREASINGLY PREVALENT GRANT OF UNJUSTIFIED TAX EXEMPTIONS AND OTHER RELATED ABUSES.

The existing confusion, and the overbroad nature of the Eleventh Circuit's holding, have made it increasingly common for companies "to enter bankruptcy with a plan for sale to be effected almost immediately after the bankruptcy case is filed with a planned distribution scheme blessed by the court, a

practice which arguably gives little more than lip service" to applicable bankruptcy principles.[10]

Indeed, the Eleventh Circuit's decision "only makes it easier for the process to go forward" and "[c]reditors who get the wrong end of these swift sales are increasingly unhappy; abuses will inevitably bring negative reactions from the bankruptcy courts."[11] Notably, the bankruptcy plan process provides for significant creditor involvement and control. Thus, to allow this tax exemption to be granted without requiring that statutory requirements be met circumvents the very protections that Congress created for creditors.

Moreover, section 1129(d) explicitly provides that a plan may not be confirmed if "the principal purpose of the plan is the avoidance of taxes." 11 U.S.C. § 1129(d). Where, as is increasingly common, most or all of the debtor's assets are liquidated through pre-confirmation sales, and the plan merely distributes those assets in a way only slightly different from a traditional Chapter 7 liquidation, it is difficult to view these plans as being confirmed for any purpose other than avoiding these taxes.

Further, if the Eleventh Circuit's expansive, non-textual approach is adopted, it will likely only fuel the "creative" approaches of debtors to further expand the exemption's reach. Even before its decision in *Piccadilly*, the Eleventh Circuit's decision in *T.H. Orlando* was criticized because it "invites all manner of creative tinkering with Chapter 11 plans" such that asset transfers can be structured "in such a way that they can be characterized, rightly or wrongly, as 'necessary to the consummation' of a plan of

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[10] *See* Honorable Nancy C. Dreher, *Eleventh Circuit parts with the Third and Fourth Circuits and holds that the § 1146(c) exemption from state stamp taxes applies to preconfirmation sales*, BANKRUPTCY SERVICE CURRENT AWARENESS ALERT (June 2007).

[11] *Id.*

reorganization." Paul D. Leake & Mark G. Douglas, *Testing the Limits of the Chapter 11 Transfer Tax Exemption: In Search of the Meaning of "Under a Plan Confirmed"*, 1 N.Y.U. J. L. & BUS. 839, 855 (Summer 2005). Accordingly, "[s]uch machinations will only make life harder for bankruptcy judges called upon to adjudicate the confirmability of a Chapter 11 plan." *Id.*

Notably, in *T.H. Orlando*, the Eleventh Circuit allowed a transfer of assets between two *non-debtor* parties to be exempted from the tax. Because the underlying transfer was arguably necessary for the debtor to receive its loan, the court held that it could prevent the collection of taxes on the third-party transactions of non-debtors. The potential for abuse under the Eleventh Circuit's interpretation of the scope of the statutory exemption is apparent.

These types of machinations are the natural result of the Eleventh Circuit's overly broad construction of section 1146(a). The bankruptcy courts in the Eleventh Circuit have increasingly faced attempts to get their approval of tax exemptions immediately upon the filing of a bankruptcy petition and long before any plan is proposed, let alone confirmed. As a result, it has become increasingly necessary for the Florida Department of Revenue to not only oppose efforts to obtain premature tax exemptions, but to attempt to require that any tax revenues be placed in escrow until a plan is actually proposed and confirmed.

Finally, it bears noting that actual confirmed plans result in only a percentage of the cases filed. For this reason, granting tax exemptions at the beginning of a case – with an expectation that a plan will be proposed and ultimately approved down the road – is putting the cart before the horse. In some instances, tax exemptions are being granted at the outset of a case, even though it is speculative that a plan will ever be confirmed and long before the appropriate standards for the grant of the exemption are actually ripe for review. This process finds no support in the Code and creates

additional difficulties and complexities, which will once again continue to proliferate under the Eleventh Circuit's view.

For these additional pragmatic reasons, this Court's review of the appropriate limits of section 1146(a)'s tax exemption is even more important given the split of authority in the circuit courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-13759

D. C. Docket No. 06-60553-CV-CMA
BKCY No. 03-27976- BKC-RB

In Re: PICCADILLY CAFETERIAS, INC.

Debtor.

STATE OF FLORIDA DEPARTMENT
OF REVENUE,

Plaintiff-Appellant,

versus

PICCADILLY CAFETERIAS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(April 18, 2007)

Before BARKETT and KRAVITCH Circuit Judges, and TRAGER,* District Judge.

PER CURIAM:

The Florida Department of Revenue ("DOR") appeals the district court's affirmance of a bankruptcy court's decision granting Piccadilly cafeterias ("Piccadilly") a stamp-tax exemption pursuant to 11 U.S.C. § 1146(c) on the sale of Piccadilly's assets. The issue presented is whether the 1146(c) stamp-tax exemption may apply to asset transfers made before the existence of a bankruptcy reorganization plan confirmed under 11 U.S.C. § 1129.

I. Background

On October 28, 2003, Piccadilly executed an asset purchase agreement with Piccadilly Acquisition Corporation ("PAC"), an affiliate of TruFoods Corporation, wherein PAC agreed to purchase substantially all of Piccadilly's assets, consisting mainly property, for $54 million. On the following day, October 29, 2003, Piccadilly filed for bankruptcy pursuant to Chapter 11 of the Bankruptcy Code. Upon commencement of its bankruptcy case, Piccadilly filed a motion requesting authorization to sell substantially all of its assets outside of the ordinary course of business pursuant to 11 U.S.C. § 363(b)(1). As part of its § 363 motion, Piccadilly also requested an exemption from stamp taxes on the asset sale pursuant to 11 U.S.C. § 1146(c). The DOR objected to both requests.

Although Piccadilly had already executed an asset purchase agreement with PAC, it nonetheless requested that the bankruptcy court conduct an auction through which the highest bidder would be entitled to purchase its assets. In an order dated December 4, 2003, the bankruptcy court approved the bidding process, scheduled an auction of Piccadilly's

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* Honorable David G. Trager, United States District Judge for the Eastern District of New York, sitting by designation.

assets, established bid and sale procedures for the auction, and scheduled a hearing to approve the ultimate sale. The winning bid of $80 million was from Piccadilly Investments, LLC.

On January 26, 2004, Piccadilly, along with a committee of senior secured note holders and a committee of unsecured creditors entered into a global settlement agreement ("Global Settlement"). The Global Settlement resolved, inter alia, the priority of distribution among Piccadilly's creditors and, according to Piccadilly, was in many ways "analogous to confirmation of a plan."

On February 13, 2004, the bankruptcy court conducted a sale hearing, approved the sale of Piccadilly's assets to Piccadilly Investments, and held that the sale was exempt from stamp taxes pursuant to § 1146(c). The court also approved the Global Settlement. On March 15, 2004, the bankruptcy court entered an amended sale order. The DOR then filed a motion to reconsider, vacate, and/or amend the sale order, which the court denied. The asset sale closed on March 16, 2004.

On March 26, 2004, Piccadilly filed its initial Chapter 11 Plan of Liquidation and later filed an "Amended Plan." The DOR filed an objection to confirmation of the Amended Plan and commenced the instant adversary action by filing a complaint against Piccadilly seeking a declaration that stamp taxes in the amount of $39,200 were not exempt under § 1146(c). On October 21, 2004, over the DOR's objection, the bankruptcy court confirmed the Amended Plan (the "Confirmation Order"). The DOR filed a motion to reconsider the Confirmation Order, which the bankruptcy court denied. The DOR then filed an amended complaint in the adversary proceeding, and both Piccadilly and the DOR filed motions for summary judgment.

Following a hearing, the bankruptcy court granted summary judgment in favor of Piccadilly, holding that the asset sale was exempt from stamp taxes pursuant to § 1146(c). The bankruptcy court reasoned that the sale of substantially all of Piccadilly's assets was a transfer "under" its confirmed plan of reorganization because the sale was necessary to consummate the plan. On appeal, the district court affirmed

the bankruptcy court's grant of summary judgment to Piccadilly. In its order, however, the district court emphasized that the parties had not addressed the issue of whether the § 1146(c) tax exemption applied to the sale of *Piccadilly's assets*, rather, the parties focused their arguments on whether the exemption may *ever* apply to asset transfers completed *before* a plan of reorganization has been confirmed by the bankruptcy court (that is, preconfirmation transfers). Thus, according to the district court, the issue of whether the § 1146(c) exemption applied to the sale of Piccadilly's assets was not properly before it. Nevertheless, the district court expressly affirmed the bankruptcy court's implicit conclusion that § 1146(c) may apply "where a transfer is made pre-confirmation." The DOR appeals.

II. Discussion

On appeal, the DOR argues that the district court erred in holding that the § 1146(c) stamp-tax exemption may apply to pre-confirmation asset sales. "[T]his court reviews a district court's order granting summary judgment de novo." In re Club Assocs., 951 F.2d 1223, 1229 (11th Cir. 1992). We likewise review de novo questions of law involving the interpretation and application of the Bankruptcy Code, whether from the bankruptcy court or the district court. In re Int'l Admin. Servs., Inc., 408 F.3d 689, 698 (11th Cir. 2005).

Section 1146(c)[1] of the Bankruptcy Code exempts from stamp or similar taxes any asset transfer "under a plan

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[1] In April of 2005, § 1146 was amended by, inter alia, re-designating what was formerly subsection(c) as subsection(a) (that is, what was § 1146(c) prior to 2005 is now § 1146(a)). Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 719(b)(3)(B), 119 Stat. 23 (2005) (amending 11 U.S.C. § 1146 (2005)). For the sake of clarity, however, we refer to § 1146(c) as it existed at the time the majority of the events relevant to this case occurred (that is, before April of 2005).

The version of § 1146(c) in effect at the time of the proceedings in the bankruptcy court reads as follows: "The issuance, transfer, or exchange of a security, or the making or

confirmed under" § 1129. 11 U.S.C. § 1146(c). The dispute in this case turns upon whether pre-confirmation transfers may constitute transfers "under a plan confirmed."

This court has yet to squarely address whether the § 1146(c) tax exemption may apply to pre-confirmation transfers. The Third and Fourth Circuits, however, have addressed this issue, and both have held that the § 1146(c) tax exemption may *not* apply to such transfers.

In In re NVR, LP, the Fourth Circuit held that the plain language of § 1146(c) foreclosed application of the tax exemption to pre-confirmation transfers. 189 F.3d 442, 456-58 (4th Cir. 1999). After determining that standard dictionaries define "under" as "[w]ith the authorization of," "inferior," or "subordinate," the Fourth Circuit stated that it could not "say that a transfer made prior to the date of plan confirmation could be subordinate to, or authorized by, something that did not exist at the date of transfer—a plan confirmed by the court." Id. at 457. The NVR court also relied on the interpretive canon that courts must narrowly construe exemptions from state taxation in reaching its holding. Id.

In In re Hechinger Investment Co. of Delaware, Inc., the Third Circuit concluded that "the most natural reading of the phrase 'under a plan confirmed' in 11 U.S.C. § 1146(c) is 'authorized' by such a plan" and held that the § 1146(c) exemption does not apply to pre-confirmation transfers. 335 F.3d 243, 252-54 (3d Cir. 2003). In so holding, the Hechinger majority determined that the "authorized by" reading "fits best with the remaining language of Section 1146(c)" and also "gives the phrase 'under a plan confirmed' the same meaning as an identical phrase in another provision of the Bankruptcy Code, 11 U.S.C. § 365(g)." Id. at 253-54. The court also relied on two interpretive canons: "tax exemption provisions are to be strictly construed" and "federal laws that interfere with a state's taxation scheme must be narrowly construed in favor of the state." Id. at 253.

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delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax." 11 U.S.C. § 1146 (c) (2000).

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Although, as stated, this court has never addressed the precise issue of whether the § 1146(c) exemption applies to pre-confirmation transfers, in In re T.H. Orlando Ltd., it addressed a somewhat similar issue of interpretation regarding § 1146(c). 391 F.3d 1287, 1291 (11th Cir. 2004). In that case, as part of a confirmed plan, a third-party mortgage lender agreed to lend money to the debtor on the condition that the owner of the property adjacent to the debtor's property would refinance its mortgage through the same mortgage lender. Id. at 1289-90. The issue before this court was whether a transaction between two non-debtors (a transaction that was specifically contemplated by the confirmed plan of reorganization) was exempt from stamp taxes under § 1146(c). Id. at 1290-91. The court concluded that "[a] transfer 'under a plan' refers to a transfer authorized by a confirmed Chapter 11 plan. In turn, a plan authorizes any transfer that is necessary to the consummation of the plan." Id. at 1291. Accordingly, this court held that "the phrase 'under a plan' refers to a transfer that is necessary to the consummation of a confirmed Chapter 11 plan."[2] Id. at 1292.

The Second Circuit also addressed an analogous issue in In re Jacoby-Bender, Inc., where the question presented was whether a property transfer that occurred post-confirmation was exempt under § 1146(c) even though the "plan did not mention any instrument of transfer and did not give the debtor the authority to make the specific sale." 758 F.2d 840, 841 (2d Cir. 1985). The Second Circuit observed that "Congress's apparent purpose in enacting section 1146(c) was to facilitate reorganizations through giving tax relief." Id. The court also

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[2] Although this court in T.H. Orlando court explicitly agreed with the "interpretation[s] of § 1146(c)" articulated in Hechinger and NVR, this court's conclusion that the phrase "under a plan" refers to a transfer that is "necessary to the consummation of a confirmed plan" does not square with the strict temporal interpretation articulated in Hechinger and NVR. See T.H. Orlando, 391 F.3d at 1291. Moreover, this court neither explicitly nor implicitly approved of the conclusion that § 1146(c) does not extend to pre-confirmation transfers. See id.

noted that § 1146(c) was derived from § 267 of Chapter X of the old Bankruptcy Act, and that § 267 had related to transactions "which serve to execute or make effective a plan confirmed under Chapter X." Id. at 841-42. To that end, the court held that a specific sale or asset transfer takes place "under" a confirmed plan within the meaning of § 1146(c) where the transfer "is necessary to the consummation of a plan."[3] Id. at 842.

In our view, the better reasoned approach to § 1146(c) is found in Jacoby-Bender and T.H. Orlando, as the better reading of "under a plan confirmed" looks not to the timing of the transfers, but to the necessity of the transfers to the consummation of a confirmed plan of reorganization. See Hechinger, 335 F.3d at 261 (Nygaard, J., dissenting).

First, the plain language of § 1146(c) is ambiguous, as the statute can plausibly be read either as describing eligible transfers to include transfers "under a plan confirmed" regardless of *when* the plan is confirmed *or*, as the DOR argues, imposing a temporal restriction on when the confirmation of the plan must occur. Second, when Congress wanted to place a temporal restriction in the Bankruptcy Code it did so expressly. See, e.g., 11 U.S.C. § 1104(a) ("At any time after the commencement of the case but before confirmation of a plan . . . ."); 11 U.S.C. § 1104(c) ("[T]hen at any time before the confirmation of a plan . . . ."); 11 U.S.C. § 1105 ("At any time before confirmation of a plan . . . ."); 11 U.S.C. § 1114(e)(2) ("Any payment for retiree benefits required to be made before a plan confirmed under [§ 1129] is

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[3] Notably, at least two bankruptcy courts have adopted the reasoning articulated in Jacoby-Bender and concluded that § 1146(c) does apply to pre-confirmation transfers that are "necessary to the consummation" of a confirmed plan. See In re Webster Classic Auctions, Inc., 318 B.R. 216, 218 (Bankr. M.D. Fla. 2004) (holding that § 1146(c) applies to transfers that are specifically contemplated by an existing plan of reorganization that is ultimately confirmed); In re Beulah Church of God In Christ Jesus, Inc., 316 B.R. 41, 47-51 (Bankr. S.D.N.Y. 2004) (holding that transfers integral to the confirmation of an existing plan are exempt under § 1146(c) as transfers necessary for the plan's consummation).

effective . . . ."); 11 U.S.C. § 1127(b) ("[A]t any time after confirmation of such plan . . . ."). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Shotz v. City of Plantation, Fla., 344 F.3d 1161, 1168 (11th Cir. 2003) (citation and internal punctuation omitted). Next, although, as a general rule, grants of tax exemptions are narrowly construed, it is equally true that "we are not to abrogate the purpose of the exemption through too narrow an application." Hechinger, 335 F.3d at 259 (Nygaard, J., dissenting). This is especially so in light of the principle that a remedial statute such as the Bankruptcy Code should be liberally construed. Matter of Crist, 632 F.2d 1226, 1232 (5th Cir. 1980)[4] (counseling "liberal construction of the Bankruptcy Act in light of the purpose of the provision under consideration"); see also Bechtel Constr. Co. v. Sec'y of Labor, 50 F.3d 926, 932 (11th Cir. 1995) (stating that "it is appropriate to give broad construction to remedial statutes"). Finally, the strict temporal construction of § 1146(c) articulated by the Third and Fourth Circuits ignores the practical realities of Chapter 11 reorganization cases, as even transfers contemplated in a plan of reorganization will not qualify for the tax exemption unless they occur *after* the order confirming a plan is entered. But it is just as probable that a debtor may need to close a sale as a condition precedent to the parties' willingness to proceed with confirmation of a plan as it is for the parties to agree on the terms of a plan, obtain confirmation, and then determine what the sale will bring. See In re Beulah Church of God In Christ Jesus, Inc., 316 B.R. 41, 50 (Bankr. S.D.N.Y. 2004). For these reasons, we decline to follow the restrictive interpretation adopted by the Third and Fourth Circuits. Instead, we hold that § 1146(c)'s tax exemption may apply to *those* pre-confirmation transfers that

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[4] In Bonner v. City of Prichard, 661 4 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions handed down by the former Fifth Circuit before the close of business on September 30, 1981.

are necessary to the consummation of a confirmed plan of reorganization, which, at the very least, requires that there be some nexus between the pre-confirmation sale and the confirmed plan.

We emphasize that the issue of whether the bankruptcy court properly applied the § 1146(c) tax exemption to the asset sale in this case has not been briefed by the parties and is not properly before us.[5] Hence, we do not decide this issue. See Hall v. Coram Healthcare Corp., 157 F.3d 1286, 1290 (11th Cir. 1998). Rather, the parties' arguments focus on whether, as a general proposition, the § 1146(c) tax exemption *may* apply to pre-confirmation transfers. As such, we leave for another day an attempt to set forth a framework for determining the circumstances under which § 1146(c)'s tax exemption may apply to pre-confirmation transfers.

III. Conclusion

For the foregoing reasons, we **AFFIRM**.

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[5] The DOR's argument that summary judgment was improper could have been based on one of two grounds—that the § 1146(c) exemption may *never* apply to pre-confirmation transfers, *or*, even if § 1146(c) *may* apply to pre-confirmation transfers, it did not apply to the specific pre-confirmation sale in *this case*. The DOR presents only the former argument before this court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 06-60553-CIV-ALTONAGA/Turnoff

In Re:

PICCADILLY CAFETERIAS, INC.

_____/

STATE OF FLORIDA DEPARTMENT OF REVENUE,

Appellant,

v.

PICCADILLY CAFETERIAS, INC.,

Appellee.

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ORDER

THIS CAUSE came before the Court upon Appellant, State of Florida Department of Revenue's ("FDOR[']s") Appeal from the Final Summary Judgment Against FDOR ["A.P. D.E." 22][1] entered by the United States Bankruptcy Court for

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[1] This Order refers to all docket entries from the adversary proceeding styled *State of Florida, Department of Revenue v. Piccadilly Cafeterias, Inc. n/k/a Capital City Cornichon Corp.*, Adv. No. 04-2310-BKC-RBR-A as "A.P. D.E." All docket entries from the core bankruptcy proceeding, styled *In re Piccadilly Cafeterias, Inc. n/k/a Capital City Cornichon Corp.*, Case No. 03-27976-BKC-RBR are referred to as "B.P. D.E"

the Southern District of Florida (the "Bankruptcy Court") on March 8, 2006, in the cases styled *In re Piccadilly Cafeterias, Inc. n/k/a Capital City Cornichon Corp.*, Case No. 03-27976-BKC-RBR; and *State of Florida, Department of Revenue v. Piccadilly Cafeterias, Inc. n/k/a Capital City Cornichon Corp.*, Adv. No. 04-2310-BKC-RBR-A. The Bankruptcy Court entered Final Judgment in accordance with its ruling granting Defendant's Motion for Summary Judgment and Denying Florida Department of Revenue's Motion for Summary Judgment (A.P. D.E. 21). The adversary proceeding, and this appeal, concern FDOR's entitlement to receive tax proceeds resulting from Piccadilly Cafeterias, Inc. n/k/a Capital City Cornichon Corp.'s ("Debtor['s]") sale of certain assets (and transfers of the deeds thereto) prior to confirmation of its plan of reorganization.[2]

FDOR has certified the following issue for the Court to consider on appeal: "Whether 11 U.S.C. § 1146 (c),[3] which exempts certain transfers made pursuant to a confirmed plan of reorganization from the imposition of stamp or similar tax, applies where a transfer is made pre-confirmation, pursuant to an order under 11 U.S.C. § 363, notwithstanding the limiting language of 1146 (c)." (*FDOR Brief* [D.E. 3] at 1). The Court has carefully considered the parties' written submissions and all applicable law.

I. BACKGROUND

Although the parties do not dispute the facts giving rise to this appeal, a brief review of the case's procedural history provides some context to the present dispute. Ultimately, however, resolution of the dispute turns entirely upon a legal question.

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[2] *See* 11 U.S.C. § 1129.

[3] The provision had previously been codified as 11 U.S.C. § 1146 (c). It has since been redesignated as 11 U.S.C. § 1146 (a) pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The substance of the provision has not changed.

Course of Bankruptcy Proceedings

Prior to entering bankruptcy, Debtor was one of the largest cafeteria chains in the United States, operating 145 cafeterias throughout the southeastern portion of the United States. Among its assets, Debtor held title to the real estate and improvements at four of its Florida locations. Before commencing the bankruptcy proceeding, Debtor explored several strategic options in an effort to maximize its enterprise value. It eventually determined that an asset sale would best serve to accomplish its goal. Thus, prior to entering bankruptcy, Debtor entertained offers from several parties seeking to purchase its assets.

Debtor ultimately executed an Asset Purchase Agreement with Piccadilly Acquisition Corporation, an affiliate of TruFoods Corporation, on October 28, 2003. The agreement contemplated a purchase price of $54 million for substantially all of Debtor's assets. Piccadilly filed for relief under the Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.*, the following day, October 29, 2003. Upon commencement of the bankruptcy proceeding, Debtor simultaneously filed a motion seeking leave to sell substantially all of its assets outside the ordinary course of business under 11 U.S.C. § 363(b)(1), free and clear of all liens, claims, encumbrances and interests.[4] *(See* B.P. D.E. 21).[5] The motion explicitly requested relief from taxes under 11 U.S.C. § 1146 (c), stating

> The Debtor intends to use the proceeds of the Sale as the basis for its plan under a liquidating Chapter 11 process. Therefore the proposed sale of the Assets is "under a

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[4] Pursuant to 11 U.S.C. § 363(b)(1), after notice and hearing, a debtor "may use, sell, or lease, other than in the ordinary course of business, property of the estate."

[5] On October 30, 2003, Debtor filed an amended motion seeking approval of the asset sale. *(See* B.P. D.E. 22). The amended motion was substantially the same as the original motion.

> plan" within the meaning of Section 1146 (c) of the Bankruptcy Code. Consummation of the Sale to Purchaser is necessary to the consummation of any plan. The consideration to be paid upon consummation of the Sale will be required to fund distributions in respect of the debts and liabilities owed by the Debtor. Given these circumstances, the sale of the Acquired Assets is one made "under a plan" pursuant to section 1146 (c) of the Bankruptcy Code, and therefore should be exempt from the imposition of any stamp or similar tax. *See, In re Permar Provisions, Inc.*, 79 B.R. 530 (Bankr. E.D.N.Y. 1987).

(*Id.* at ¶ 32).

Although Debtor had already executed an asset purchase agreement with Piccadilly Acquisition Corporation, it nonetheless sought leave of the Bankruptcy Court to conduct an auction[6] through which the highest bidder would be entitled to purchase its assets.[7] The bidding process was approved in a

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[6] As the initial bidder, Piccadilly Acquisition Corporation served as a so-called "stalking horse" whose initial research, due diligence, and subsequent bid may encourage later bidders. *See In re 310 Associates*, 346 F. 3d 31, 34 (9th Cir. 2003). For its role, Piccadilly Acquisition Corporation was entitled to receive a breakup fee.

[7] On November 7, 2003, Debtor filed a Motion for Entry of Order (A) Approving Competitive Bidding and Sale Procedures; (B) Approving Form of Asset Purchase Agreement; (C) Approving Form and Manner of Notices; (D) Scheduling Hearing Dates to Conduct Auction and to Consider Final Approval of Sale Including Treatment of Executory Contracts and Unexpired Leases; and (E) Granting Related Relief (B.P. D.E. 67). The motion was subsequently amended.

Bankruptcy Court Order dated December 4, 2003.[8] (*See* B.P. D.E. 174). The order scheduled an auction of Debtor's assets, established bid and sale procedures for the auction and scheduled a hearing to approve the ultimate sale. The winning bidder, Piccadilly Investments, LLC, paid $80 million for Debtor's assets, an amount significantly higher than Piccadilly Acquisition Corporation's (pre-bankruptcy) $54 million bid.

A sale hearing was conducted, and an order approving the sale of substantially all of Debtor's assets to Piccadilly Investments, LLC was entered by the Bankruptcy Court on February 13, 2004.[9] In response to FDOR's objection to the provision in the motion that exempted the transaction from taxes, the Bankruptcy Court stated that "the problem raised by counsel [for FDOR] is [Piccadilly's] problem. If I approve the sale [Piccadilly will] deal with that problem from the amount of money from the sale." Thus, the Bankruptcy Judge ultimately overruled the objection by approving the sale but explicitly stated that the order would not prejudice FDOR's claim. *(February 13, 2004 Hearing* at 38-39). The transaction asset sale closed on March 16, 2004. Among the assets sold were four parcels of land, and the sale was memorialized through the transfer of special warranty deeds from Piccadilly Cafeterias, Inc. to Piccadilly Restaurants, LLC. *(See Second Am. Comp.,* Ex. A).[10] FDOR claims that the transfer of the real estate and deed entitles it to collect taxes.[11]

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[8] An amended order was entered on December 11, 2003.

[9] An amended sale order was entered on March 15, 2004. The amended order altered the manner in which secured noteholders could accept payment. The amended order was entered over the objection of FDOR.

[10] The four special warranty deeds are all dated March 16, 2004. The parcels were purchased for the sums of (1) $1,825,000; (2) $1,500,000; (3) $815,000: and (4) $1,460,000.

[11] FDOR does not identify the provision of the tax code pursuant to which it claims to be entitled to collect taxes. However, Debtor does

From their inception, the bankruptcy proceedings had been quite contentious, as the various interested parties each vied for a portion of Debtor's assets. In order to resolve the multitude of disputes between the interested parties, Debtor, the Ad Hoc Committee of Senior Secured Noteholders and the Official Committee of Unsecured Creditors, entered into a global settlement agreement. The settlement agreement resolved, among other things, the priority of distribution among Debtor's creditors and in many ways was analogous to a confirmation plan. The Bankruptcy Court approved the settlement agreement in an order dated February 25, 2004. (B.P. D.E. 374).

Shortly following the closing of the Debtor's asset sale and the approval of the settlement agreement, Debtor filed its initial confirmation plan and disclosure statement on March 26, 2004. (B.P. D.E. 469, 470).[12] An Amended Joint Chapter 11 Plan of Liquidation and disclosure statement were filed on July 31, 2004. The Bankruptcy Court confirmed the Amended Plan of Reorganization on October 21, 2004. (B.P. D.E. 1044).

FDOR's Actions

Throughout the bankruptcy proceedings, FDOR maintained that it was entitled to collect taxes and took multiple actions to protect its interests. FDOR initially argued that the bidding procedures did not protect its interests and sought reconsideration of the bidding procedures order (B.P. D.E. 221),[13] a request that the Bankruptcy Court denied.

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not dispute that in the absence of the section 1146 tax exemption, FDOR would be entitled to the disputed taxes.

[12] The initial plan and disclosure statement are not part of the record on appeal.

[13] FDOR argued that it had not received notice of the hearing on the motion.

FDOR also objected to Debtor's request for a tax exemption under section 1146 in its motion seeking leave to sell substantially all of its assets. (*See* B.P. D.E. 186). Notwithstanding FDOR's objections, following a hearing, the Bankruptcy Court approved the sale of Debtor's assets in an order dated February 13, 2004. (*See* B.P. D.E. 347). The order stated that "[t]he sale of the Acquired Assets are [sic] in contemplation of a plan and, accordingly, the transfer of the Acquired Assets to the Purchaser are [sic] exempt, under section 1146 (c) of the Bankruptcy Code, from any transfer, stamp or similar tax ." (*See Id.* at p. 18).[14]

After the Bankruptcy Court amended the sale order, FDOR filed a Motion for Reconsideration of Hearing and or Motion to Vacate Order Granting Emergency Motion of Debtor to Amend Sale Order, Vacating the Portion of the Amended Order and the Sale Order Granting the Debtor an 1146 (c) Tax Exemption Prior to a Confirmed Plan. The motion was rejected in an order dated May 24, 2004. (B.P. D.E. 646). FDOR initially sought to appeal the May 24, 2004 order (*see* B.P. D.E. 660), but voluntarily dismissed the appeal. (*See August 24, 2004 Order of Dismissal*).

FDOR then attempted another route to challenge the tax exemption, filing an objection to the Amended Joint Chapter 11 Plan of Liquidation on September 2, 2004.[15] (B.P. D.E. 944). The Bankruptcy Court approved the confirmation plan over FDOR's objections in an order dated October 21, 2004. FDOR subsequently sought reconsideration of the order confirming the plan of reorganization in a motion dated October 28, 2004 (B.P. D.E. 1075), a request that was denied.

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[14] As noted, however, the order did not prejudice FDOR's ability to further pursue its interests.

[15] FDOR filed an amended objection on October 21, 2004. (B.P. D.E. 1040)

FDOR commenced the adversary proceeding giving rise to this appeal by complaint[16] filed on October 20, 2004. FDOR filed a Second Amended Complaint in the adversary proceeding on November 23, 2004.[17] FDOR seeks[18] approximately $39,200 in stamp taxes from Debtor. Debtor and FDOR filed cross-motions for summary judgment in the adversary proceeding.

The Bankruptcy Court held oral argument on the summary judgment motions, at which time Debtor argued that "[t]here would be no plan in this case had there not been the sale of this property, had there not been the global settlement agreement that set up the sale of the property and that set up the framework of the plan." (*Transcript* at 11). At oral argument, FDOR conceded that "the actual sale itself contemplated the liquidating plan." (*Id.* at 14). The Bankruptcy Judge emphasized the uniqueness of the facts of the case.

In granting Debtor's motion for summary judgment, and denying FDOR's motion, the Bankruptcy Court held that "[t]he transfer of substantially all of the assets of the Debtor, including the Florida properties, were transfers 'under' the Plan because such transfer was necessary to consummate the

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[16] In its original complaint, FDOR sought $2 million. The amount sought was reduced to $39,200 in its second amended complaint.

[17] FDOR similarly filed a proof of claim for $2 million which it voluntarily reduced to $39,200. Debtor objected to the claim. The claim objection was ultimately consolidated with the adversary proceeding.

[18] The precise relief requested by FDOR is unclear. The Second Amended Complaint initially seeks a declaratory judgment. (*Second Amended Complaint* [A.P. D.E. 6]). However, the pleading subsequently "demands Judgment against Defendant for approximately $39,200.00, due and owing to Plaintiff for documentary stamp taxes, not including an amount due and owing for mortgage recording taxes . . . and further relief as this Court deems just and proper." (*Id.*)

Plan. The sale of substantially all of the assets of the Debtor contemplated the liquidating plan, which sale and plan were so interwoven that one could not proceed without the other." (*Summary Judgment Order* ¶ 24). Moreover, "[s]uch transfer was necessary to the consummation of the confirmed Plan because the sale of Debtor's assets generated the proceeds required to fund the Plan." (*Id.* at ¶ 25). FDOR appeals the Bankruptcy Court's order.

II. ANALYSIS

The parties' dispute concerns the proper interpretation, and reach, of 11 U.S.C. § 1146 (a).[19] The provision states that "[t]he issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax." 11 U.S.C. § 1146 (a). The Eleventh Circuit has held that the following three conditions must be satisfied before a party may qualify for an exemption under section 1146 (a): (1) there must be a stamp tax or similar tax, (2) imposed upon the making or delivery of an instrument of transfer, (3) "under" a confirmed Chapter 11 plan. *In re T. H. Orlando Ltd.,* 391 F.3d 1287, 1291 (11th Cir. 2004)(citing *In re Amsterdam Ave. Dev. Ass'n,* 103 B.R. 454, 456 (Bankr. S.D.N.Y. 1989)). The parties concede that the first two conditions have been satisfied here. Thus, the dispute turns entirely upon whether pre-confirmation transfers constitute transfers "under" a confirmation plan.

A. Overview of Case Law

Notwithstanding Debtor's argument to the contrary, the issue is still very much unsettled among courts. Debtor argues

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[19] District courts have appellate jurisdiction over the judgments, orders, and decrees of bankruptcy courts. 28 U.S.C. § 158(a). On appeal, a district court reviews a bankruptcy court's conclusions of law *de novo. In re Calvert,* 907 F.2d 1069, 1071 (11th Cir. 1990).

that "there are only two circuits, the Third and Fourth, that have ruled on the issue as urged by the DOR. Nearly every other court supports the position of the Appellee." (*Debtor's Brief* at 8). Debtor neglects to mention that the Third and Fourth Circuits *are the only circuit courts to squarely address the issue.*

In *In re NVR, LP,* 189 F.3d 442 (4th Cir. 1999), the Fourth Circuit held that the plain language of section 1146 foreclosed application of the tax exemption to pre-confirmation property transfers. The court stated:

> The question is whether the word "under," as used in § 1146 (c), could extend the statute's effect to preconfirmation transfers. To ascertain the ordinary understanding of "under," we turn to the dictionary. *See MCI Telecomm. Co. v. A T & T Corp.,* 512 U.S. 218, 228, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994) (discussing the use of dictionary definitions to interpret statutory text). Black's Law Dictionary defines "under" as "'inferior' or 'subordinate.'" *Black's Law Dictionary* 1525 (6th ed. 1990). Another standard dictionary defines "under" as "[w]ith the authorization of." *See Webster's II New Riverside University Dictionary* 1256 (1988). Logically reading these definitions in the context of § 1146[a], we cannot say that a transfer made prior to the date of plan confirmation could be subordinate to, or authorized by, something that did not exist at the date of transfer-a plan confirmed by the court.

Id. at 457. Finding that the "plain language" was incapable of supporting an interpretation that made section 1146 (a) applicable to pre-confirmation transfers, the Fourth Circuit did not engage in any further inquiry.

The Third Circuit recently reached an identical conclusion to that reached by the Fourth Circuit (section 1146 does not apply to pre-confirmation property transfers) although it did not adopt the Fourth Circuit's reasoning. *See In re Hechinger Inv. Co. of Delaware, Inc.*, 335 F.3d 243 (3d Cir. 2003)(Alito, J.). In *Hechinger*, the Third Circuit rejected the suggestion that the term "under" could only have one meaning in the context of section 1146, although it found "that 'authorized by' is the most natural reading of the term 'under.'" *Id.* at 252-53. It supported its conclusion that "under" is properly interpreted as "authorized by," and that 1146 is therefore inapplicable to pre-confirmation transfers, on the following bases: (1) the reading is in greatest harmony with the additional language of section 1146, *id.* at 253; (2) the reading "gives the phrase 'under a plan confirmed' the same meaning as an identical phrase in another provision of the Bankruptcy Code, 11 U.S.C. § 365 *(g)," id.* at 254; (3) the reading is consistent with the maxim of statutory construction that tax exemption provisions are to be strictly construed, id; and (4) the reading is consistent with the Supreme Court's instruction that "federal laws that interfere with a state's taxation scheme must be narrowly construed in favor of the state." *Id.* (citations omitted).

The circuit court decision relied upon by Debtor, and cited by district courts that have granted exemptions to pre-confirmation transfers, is the Second Circuit's decision in *In re Jacoby-Bender, Inc.*, 758 F.2d 840 (2d Cir. 1985). *In Jacoby-Bender*, the precise question presented to the Second Circuit was whether a property transfer that occurred post-confirmation was exempt under section 1146, notwithstanding that the confirmation "plan did not mention any instrument of transfer and did not give the debtor the authority to make the specific sale." *Id.* at 841.[20] Thus, the *Jacoby-Bender* court did

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[20] Subsequent decisions have questioned whether the transfer was indeed a post-confirmation transfer. However, the undersigned finds resolution of the question to be irrelevant as, in the opinion, the Second Circuit clearly believed that it was addressing the applicability of section 1146 to a post-confirmation transfer.

not specifically address the question presented here; namely, whether a transfer must have taken place post-confirmation in order to qualify for the tax exemption under section 1146. *See In re 310 Associates, L.P.*, 282 B.R. 295, 300 (S.D.N.Y. 2002) ("The Second Circuit did not address any timing issue in *Jacoby-Bender*. *Jacoby-Bender* involved a post-confirmation transfer, not a transfer occurring before the drafting of any plan."). Although the court's holding is distinguishable, the language underlying the holding is relevant to the parties' dispute.

The *Jacoby-Bender* court noted that "Congress's apparent purpose in enacting section 1146 was to facilitate reorganizations through giving tax relief." *Id.* at 841. Therefore, the court held that whether a plan specifically addressed a particular transfer was irrelevant. *Id.* Finally, and most importantly to the instant issue, the Second Circuit held that "where, as here, a transfer, and hence an instrument of transfer, is necessary to the consummation of a plan, the plan seems implicitly to have 'dealt with' the transfer instrument." *Id.* at 842. It is the latter reasoning upon which subsequent courts have focused in rejecting the argument that section 1146 does not apply to pre-confirmation transfers. *See, e.g., In re Webster Classic Auctions, Inc.*, 318 B.R. 216 (Bankr. M.D. Fla. 2004); *In re Beulah Church of God In Christ Jesus, Inc.*, 316 B.R. 41 (Bankr. S.D.N.Y. 2004); *In re GST Telecom, Inc.*, No. 00-1982-GMS, 2002 WL 442233 (D. Del. March 20, 2002); *In re Linc Capital, Inc.*, 280 B.R. 640 (Bankr. N.D. Ill. 2002); *In re Lopez Development, Inc.*, 154 B.R. 607, 609 n.3 (Bankr. S.D. Fla. 1993); *In re Permar Provisions, Inc.*, 79 B.R. 530 (Bankr. E.D.N.Y. 1987); *In re Smoss Enterprises Corp.*, 54 B.R. 950 (E.D.N.Y. 1985).

Of course, while the pronouncements of other circuits may be persuasive, the Court is only bound by the dictates of the Eleventh Circuit, which has never squarely addressed the issue in a reported decision. Debtor and the Bankruptcy Court's decision rely upon the Eleventh Circuit's recent decision in *In re T.H. Orlando Ltd.*, 391 F.3d 1287 (11th Cir.

2004), to support the position that section 1146 is applicable to pre-confirmation property transfers. As both parties acknowledge, *T.H. Orlando* was before the Eleventh Circuit under a different factual predicate than the one presented here. In *T.H. Orlando,* as part of a confirmation plan, a third-party mortgage lender agreed to lend money to the debtor on the condition that a non-debtor who owned property adjacent to the debtor's property would refinance its mortgage through the same mortgage lender. The question before the Eleventh Circuit was whether taxes arising from a transaction between two non-debtors, a transaction that was specifically contemplated by the confirmed plan of reorganization, was entitled to an exemption under section 1146.

The *T.H. Orlando* court explicitly agreed with the holdings in all three of the aforementioned circuit court opinions. It noted that "[a] transfer 'under a plan' refers to a transfer authorized by a confirmed Chapter 11 plan. In turn, a plan authorizes any transfer that is necessary to the consummation of the plan." *Id.* at 1291. The court "conclude[d] that the phrase 'under a plan' refers to a transfer that is necessary to the consummation of a confirmed Chapter 11 plan irrespective of whether the transfer involved the debtor or property of the estate." *Id.* at 1292.

Both parties urge contrasting interpretations of the holding of *T.H. Orlando* that do not find support in the language of the opinion. Although FDOR correctly notes that the Eleventh Circuit approvingly cited the Third and Fourth Circuit opinions in *Hechinger and NVR,* respectively, it neither implicitly nor explicitly approved of the holding that section 1146 (a) is inapplicable to pre-confirmation transfers. Likewise, the court's conclusion that "'under a plan' refers to a transfer that is necessary to the consummation of a confirmed Chapter 11 plan," *id.* at 1292, does not necessarily support the statutory interpretation urged by Debtor. Indeed, *T.H. Orlando* speaks to transactions "necessary to the *consummation* of a confirmed Chapter 11 plan." *Id.* Debtor would have this Court read "necessary to the *consummation* of a confirmed Chapter 11 plan" as "necessary to *confirmation* of a proposed (or

contemplated) confirmation plan." While Debtor's interpretation is reasonable, it is certainly not required.

It is worth noting that the only two Florida bankruptcy cases identified by the Court that have addressed the question both held section 1146 (a) to be applicable to pre-confirmation property transfers. In *In re Lopez Development, Inc.*, the court stated that "the fact that the transfers of the Properties occurred prior to confirmation is, for purposes of 11 U.S.C. § 1146 (c), of no consequence. . . . the purpose of this section is to facilitate reorganizations by granting tax relief. The Court will not construe this section to limit its applicability to transfers occurring after a plan is confirmed. To do so would not facilitate reorganizations." 154 B.R. 607 at 609 n.3.

Likewise, in *In re Webster Classic Auctions, Inc.*, 318 B.R. at 216, the bankruptcy court thoughtfully analyzed the issue as follows:

> A striking similarity between the Third and Fourth Circuit opinions is both opinions reversed bankruptcy court findings that § 1146 [a] applied to the transfers at issue in their cases, perhaps implying the sometimes academic exercise of statutory interpretation may be overshadowing the practical realities of bankruptcy reorganization. This Court finds § 1146 [a] does not contain a per se temporal requirement, but rather requires appropriate notice and opportunity for parties to understand there is a debtor in bankruptcy and the transfer in question involves the debtor's property and a taxable event. As Chapter 11 reorganization is a sophisticated process, this Court finds inserting an artificial pre-confirmation v. postconfirmation line of demarcation into the § 1146 [a] analysis fails to recognize the complexities the reorganizing debtor often faces. For these reasons, this Court will not follow the restrictive interpretation adopted

by the Third and Fourth Circuit Courts of Appeal.

Id. at 219. The court proceeded to outline a framework requiring that the following criteria be satisfied before a pre-confirmation property transfer may be exempt from taxes pursuant to section 1146 (a): (1) there must be a plan that contemplates the sale of property; (2) the plan must be ultimately confirmed; (3) any sale of property contemplated in the plan which is sought to be sold prior to confirmation must set out the requirements of § 1146 (a), and must be served on all relevant taxing authorities; and (4) notice to the authorities must be included in the section 363 sale motion. *Id.*

Having benefited from the well-reasoned opinions of other courts, the Court now turns to its own analysis.

B. Statutory Construction

Courts that have refused to impose strict temporal requirements have stressed that "Congress's apparent purpose in enacting section 1146 was to facilitate reorganizations through giving tax relief." *Jacoby-Bender,* 758 F.2d at 841. Indeed, it appears beyond dispute that "[t]here are times when it is more advantageous for the debtor to begin to sell as many assets as quickly as possible in order to insure that the assets do not lose value." *GST Telecom,* 2002 WL 442233, at *2. Thus, there are times when "it is actually more likely (and, sometimes, more wise) for debtors to sell assets prior to confirmation." *Id. See also In re Beulah Church of God In Christ Jesus, Inc.,* 316 B.R. at 50 ("it is just as likely that a debtor may need to arrange a financing or to close a sale as a condition precedent to the parties' willingness to proceed with plan confirmation as it is for the parties to agree on the terms of a plan, obtain confirmation and then see what the sale of a key asset or a proposed financing will bring"). Given Congress' purported intent in enacting 11 U.S.C. § 1146, and the possibility that such intent would be undermined if courts were to impose a bright-line temporal requirement, many

courts have adopted a functional, rather than bright line, test to determine if a property transfer is "under" a confirmation plan.

However, lest we get ahead of ourselves, it is a well-known maxim of statutory construction that a court must begin "with the language of the statute itself." *In re T.H. Orlando Ltd.*, 391 F.3d at 1291 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)). Thus, any discussion of furthering Congress' intentions is premature, as the language of the statute controls. Indeed, "it is not for [the Court] to substitute its view of . . . policy for the legislation which has been passed by Congress." *In re Hechinger*, 335 F.3d at 256 (citation omitted).

Here, however, a "plain meaning" analysis does not yield any clear answer to the question of whether the term "under" contains an implicit or explicit temporal limitation. Indeed, as noted by the Third Circuit "[t]he preposition 'under' is . . . very common, and it can have many different meanings in different contexts." *Id.* at 252. The ubiquitous nature of the term "under" is evidenced by the *Hechinger* court's identification of one dictionary listing 13 definitions of the term and another dictionary listing *27 definitions*. *See Id.* (citations omitted). As Judge Wilkinson insightfully noted in his concurring opinion in *In re NVR*, "[i]f Congress used the words 'under a plan ultimately confirmed,' that would have made the matter clear. Or if Congress used the words 'under a confirmed plan,' that would have made its intentions obvious. Congress used neither phrasing-hence the ambiguity." 189 F.3d at 458 n.1.

Having failed to resolve the issue by reference to the "plain meaning" of the statutory language, the undersigned turns to other tools of statutory interpretation for help. Unfortunately, other textual approaches to the problem also fail to support a clear result. *Hechinger* concluded that a contextual reading of the term "under" supported a holding that section 1146 is inapplicable to pre-confirmation property transfers. Respectfully, the undersigned does not agree.

Hechinger noted that "[i]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *In re*

Hechinger, 335 F.3d at 253. After analyzing the Bankruptcy Code's other uses of the term "under" and "under a plan confirmed," focusing particularly on the uses of the term "under" in section 1146, it concluded that "under" meant "authorized by." *See id.* at 253-54. Because "authorized by" implicitly contains a temporal limitation, the court held section 1146 inapplicable to pre-confirmation transfers.

As the dissent in *Hechinger* emphasized, the term "under" is used nearly two hundred times throughout the Bankruptcy Code. *Id.* at 258. Thus, settling upon one universal definition of the term, a term that has multiple accepted definitions, which is universally applicable throughout the Bankruptcy Code, is impossible. Moreover, Judge Nygaard (in dissent) aptly recognized that the Third Circuit's interpretation runs afoul of several other maxims of statutory construction, including the following: (1) Congress used the term "authorized under" in several other sections of the code and thus would presumably have used the term in section 1146 if it so desired; (2) 11 U.S.C. § 1129 clearly contemplates that certain payments may be made "under a plan" although the plan has not been confirmed, thereby undermining the conclusion that "under a plan confirmed" requires that the plan be confirmed prior to the transaction; and (3) Congress applied temporal restrictions in several other sections of the Bankruptcy Code and would have done so in section 1146 if it had so desired. *See id.* at 257-59. The undersigned does not suggest that Judge Nygaard's dissenting opinion is more persuasive than the majority opinion but merely addresses his arguments as evidence that a contextual reading of section 1146 is no more conclusive than is a "plain meaning" interpretation. Indeed, the difficulty in reaching a result through the text of the Bankruptcy Code is evidenced by the failure of both the Third and Fourth Circuit panels to reach a unanimous holding.

FDOR also argues that the rules pertaining to construction of tax statutes favor its position. It is well-established "that tax-exemption and-deferral provisions are to be construed narrowly." *U. S. v. Centennial Sav. Bank FSB,* 499 U.S. 573, 583 (1991)(citing *Commissioner v. Jacobson,*

336 U.S. 28, 49 (1949); *Elam v. Commissioner*, 477 F.2d 1333, 1335 (6th Cir. 1973)). Likewise, there is a "strong background presumption against interference with state taxation." *National Private Truck Council, Inc. v. Oklahoma Tax Com'n*, 515 U.S. 582, 590 (1995). The parties do not contest that section 1146 is a provision that, by design, both provides a tax exemption and interferes with state taxation.

"[T]he danger in choosing an interpretive canon is that it may, like an importunate acquaintance, unduly monopolize one's attention." *In re Beulah Church of God In Christ Jesus, Inc.*, 316 B.R. at 50. In *In re T.H. Orlando*, the Eleventh Circuit considered the argument raised by FDOR here; namely, that the need to narrowly construe tax exemption statutes counseled against a holding that transactions between non-debtors are exempt under the statute. The court roundly rejected the argument, noting that "[n]othing in the plain language of § 1146 (c) restricts the exemption to transactions involving the debtor and estate property." 391 F.3d at 1295. Admittedly, and as stated, *In re T.H. Orlando* is not on all fours with this case. However, its reasoning is both relevant and persuasive. In the absence of language to the contrary, the Eleventh Circuit held that where Congress intends to exempt certain transactions, it will not construct exceptions to the exemptions that do not appear in the relevant language of the provision. Similarly, in the absence of any language imposing a temporal requirement, the undersigned does not believe it to be the duty, or prerogative, of the Court to impose one.

After finding the above rules of statutory construction to be unhelpful, the Court returns to its duty to interpret statutes consistent with the intentions of Congress. The undersigned fully adopts the Second Circuit's observation that "Congress's apparent purpose in enacting section 1146 was to facilitate reorganizations through giving tax relief." *Jacoby-Bender*, 758 F.2d at 841; *see also In re NVR*, 189 F.3d at 459 ("reading the phrase to require only that the plan ultimately be confirmed would comport with a central purpose of our bankruptcy laws: 'permitting business debtors to reorganize and restructure their debts in order to revive the debtors' businesses and thereby preserve jobs and protect

investors')(Wilkinson, J. concurring)(quoting *Toibb v. Radloff*, 501 U.S. 157, 163 (1991))(citation omitted). Given Congress's purpose in granting the exemption, it is "difficult to believe that Congress intended such a limited application of the exemption, particularly given the absence of a rational basis for preferring some plan scenarios over others." *In re Hechinger Inv. Co. of Delaware, Inc.*, 254 B.R. 306, 320 (Bankr. D. Del. 2000).[21]

Indeed, the instant case presents a perfect example of the perils of imposing an arbitrary temporal requirement. As noted, Debtor initially received a $54 million offer for its assets; only a few months later, Debtor sold its assets for $80 million. Neither party disputes that the vagaries of the market often dictate that time is of the essence and that waiting for a plan to be confirmed before making a sale will often be detrimental, or even fatal, to the ultimate confirmation of the plan. The undersigned declines to adopt an interpretation that will effectively remove most transactions in furtherance of confirmation plans from the reach of the exemption.

C. Reach of Holding

The undersigned emphasizes that in this appeal, she has been presented with the limited question of "[w]hether 11 U.S.C. § 1146 (c) . . . applies where a transfer is made pre-confirmation." Thus, this Order only addresses whether section 1146's tax exemption *may be* applied, as a general proposition, to pre-confirmation transfers. Whether the Bankruptcy Court appropriately applied the exemption to the specific pre-confirmation property transfers at issue has not been addressed by the parties and the Court will not decide an issue not properly before it.

---

[21] Congressional intent is gleaned solely from the content of section 1146 as "the legislative history of section 1146 (c) is, at best, scant, indirect and uninformative." *In re Beulah Church of God In Christ Jesus*, 316 B.R. at 49 (citations omitted).

Accordingly, the Court need not answer whether a confirmation plan need be filed with the bankruptcy court and/or contemplated by the parties in order for the 1146 (a) exemption to apply. The Court cautions, however, that not all pre-confirmation asset sales will be entitled to the section 1146 exemption. Indeed, 11 U.S.C. § 363 permits a debtor (or trustee) to sell a substantial portion of its assets with court approval. Had Congress intended to exempt all such transfers from taxation, it could have easily done so. Thus, sale of assets under section 363 and the consummation of a confirmation plan are not enough to entitle a party to the 1146 exemption. There must be some nexus between the pre-confirmation sale and the confirmation plan. As stated, however, the extent of that nexus, and the relevant procedural considerations, need not be outlined at present.

III. CONCLUSION

As Isaac Newton aptly observed, "[i]f I have seen further it is by standing on the shoulders of giants." The Court has been presented with a very difficult question with sound arguments supporting each party's position. Luckily, the undersigned has had the benefit of other courts' well-reasoned analyses in ultimately concluding that section 1146 (a) may apply to pre-confirmation property transfers. For the reasons stated above, it is

ORDERED AND ADJUDGED that the Bankruptcy Court's Final Summary Judgment Against Plaintiff, State of Florida, Department of Revenue is **AFFIRMED**. The Clerk of the Court is instructed to **CLOSE** the case and all pending motions are **DENIED AS MOOT**.

DONE AND ORDERED in Chambers at Miami, Florida this 23 day of June, 2006.

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: Hon. Raymond B. Ray
Magistrate Judge William C. Turnoff
All Counsel of Record

APPENDIX C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION
www.flsb.uscourts.gov

In re: Chapter 11 Cases
Case No. 03-27976-BKC-RBR

PICCADILLY CAFETERIAS, INC., now known as CAPITAL CITY CORNICHON CORP.

Debtor.

_____/

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Plaintiff,

v. Adv. No. 04-2310-BKC-RBR-A

PICCADILLY CAFETERIAS, INC., now known as CAPITAL CITY CORNICHON CORP.,

Defendant.

_____/

FINAL SUMMARY JUDGMENT AGAINST PLAINTIFF, STATE OF FLORIDA, DEPARTMENT OF REVENUE

THIS MATTER having come before the Court upon the *Defendant's Motion for Summary Judgment* (C.P. No. 12) filed against the Plaintiff, State of Florida, Department of Revenue, in the above adversary proceeding. The Court, having noted the entry of the *Order Granting*

Defendant's Motion for Summary Judgment, and being otherwise fully advised in the premises, does

ORDER that final summary judgment is hereby entered in favor of the Defendant, Piccadilly Cafeterias, Inc., now known as Capital City Cornichon Corp., having a mailing address of c/o Soneet R. Kapila, Plan Administrator, 1000 S. Federal Highway, Suite 200, Fort Lauderdale, FL 33316, and against the Plaintiff, State of Florida, Department of Revenue, having mailing addresses of 5050 W. Tennessee Street, Tallahassee, FL 32399 and 501 S. Calhoun Street, Tallahassee, FL 32399, with respect to all counts set forth in the *Second Amended Complaint* (C.P. No. 6) filed by the Plaintiff in this adversary proceeding.

ORDERED in the Southern District of Florida on 03/08/06.

_____

Raymond B. Ray, Judge
United States Bankruptcy Court

Submitted by:
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Copies furnished to:
Leslie Gern Cloyd, Esq.
(Attorney Cloyd is directed to serve a conformed copy of this Order upon all interested parties, and to file a Certificate of Service with the Court).

APPENDIX D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION
www.flsb.uscourts.gov

In re: Chapter 11 Cases
Case No. 03-27976-BKC-RBR

PICCADILLY CAFETERIAS, INC., now known as CAPITAL CITY CORNICHON CORP.

Debtor.
_____/

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Plaintiff,

v. Adv. No. 04-2310-BKC-RBR-A

PICCADILLY CAFETERIAS, INC., now known as CAPITAL CITY CORNICHON CORP.,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING FLORIDA DEPARTMENT OF REVENUE'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER having come before the Court on the 15th day of February 2005 at 9:30 A.M., in Fort Lauderdale, Florida, upon the *Defendant's Motion for Summary Judgment* (C.P. No. 12) (the "Defendant's

Summary Judgment Motion") and the *Florida Department of Revenue's Motion for Summary Judgment* (the "FDOR Summary Judgment Motion") (C.P. No. 14). The Court, having (i) considered the Defendant's Summary Judgment Motion, the FDOR Summary Judgment Motion, and the Court file in this case; (ii) considered the argument of counsel; and (iii) been otherwise fully advised in the premises does hereby make the following findings of fact and conclusions of law:

Factual Background

1. The bankruptcy case of Piccadilly Cafeterias, Inc. (the "Defendant" or the "Debtor") was commenced by the filing of a voluntary petition for relief under chapter 11, title 11, United States Code (the "Bankruptcy Code") on October 29, 2003.

2. On December 1, 2003, the Debtor filed its schedules indicating assets consisting of real and personal property valued at approximately $38,000,000 as well as listing 137 unexpired leases of non-residential real property to which the Debtor was a party (collectively, the "Assets").

3. On October 29, 2003 and October 30, 2003, respectively, the Debtor filed the *Debtor's Motion for (I) Approval of Sale of Substantially All of its Assets Outside the Ordinary Course of Business, Free and Clear of All Liens, Claims, Encumbrances and Interests; and (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases* and the *Debtor's Amended Motion for (I) Approval of Sale of Substantially All of its Assets Outside the Ordinary Course of Business, Free and Clear of All Liens, Claims, Encumbrances and Interests; and (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and*

Unexpired Leases (C.P. Nos. 21 and 22, respectively) (collectively, the "Sale Motion"). Pursuant to the Sale Motion, the Debtor sought authorization to sell substantially all of the Assets pursuant to 11 U.S.C. § 363 (the "Sale").

4. On November 7, 2003, the Debtor filed the *Motion by Debtor for Entry of Order (A) Approving Competitive Bidding and Sale Procedure; (B) Approving form of Asset Purchase Agreement; (C) Approving form and Manner of Notices; (D) Scheduling Hearing Dates to Conduct Auction and to Consider Final approval of Sale Including Treatment of Executory Contracts and Unexpired Leases; and (E) Granting Related Relief* (C.P. No. 67) (the "Bid Procedures Motion"). The Bid Procedures Motion requested that bid and other sale procedures be established with respect to the Sale.

5. On December 4, 2003, the Court entered the *Order (A) Approving Amended Competitive Bidding and Sale Procedures, and Bid Protection, (B) Approving Amended Form of Asset Purchase Agreement; (C) Approving Form and Manner of Notice; (D) Scheduling Hearing Dates to Consider Auction and to Consider Final Approval of Sale Including Treatment of Executory Contracts and Unexpired Leases; and (E) Granting Related Relief* and on December 11, 2003, the Court entered the *Amended Order (A) Approving Amended Competitive Bidding and Sale Procedures, and Bid Protection, (B) Approving Amended Form of Asset Purchase Agreement; (C) Approving Form and Manner of Notice; (D) Scheduling Hearing Dates to Consider Auction and to Consider Final Approval of Sale Including Treatment of Executory Contracts and Unexpired Leases; and (E) Granting Related Relief* (C.P. No. 208) (collectively, the "Bid Procedures Order"). The Bid Procedures Order, among other

things, scheduled an auction for the Debtor's assets, established bid and sale procedures for participation and the conduct of the auction and scheduled a hearing date to approve the Sale to a party making the highest and best bid for the Debtor's assets.

6. On December 8, 2003, the State of Florida, Department of Revenue ("FDOR") filed the *Florida Department of Revenue's Objection to Debtor's Amended Motion for (I) Approval of Sale of Substantially All of Its Assets Outside the Ordinary Course of Business, Free and Clear of all Liens, Claims, Encumbrances and Interest; and (II) Authorizing and Assignment of Certain Executory Contracts and Unexpired Leases* (C.P. No. 186).

7. On January 26, 2004, the Debtor, the Ad Hoc Committee of Bondholders, and the Official Committee of Unsecured Creditors (the "Creditors' Committee") entered into a global settlement (the "Global Settlement"), subject of a motion to approve such Global Settlement (See C.P. No. 303), which was later approved by the Court at a hearing conducted on February 13, 2004. On February 25, 2004, an order approving the Global Settlement was entered (See C.P. No. 374). The Global Settlement provided, among other things, for a pro rata distribution of the proceeds of the Sale to be paid to claimants holding allowed general unsecured claims (after payment of holders of allowed secured, priority and administrative claims).

8. On February 13, 2004, the Court conducted a hearing and entered the *Order Approving the Sale of Assets Free and Clear of All Liens, Claims, Interests and Encumbrances and the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases* (C.P. No. 347) (the "Order Approving Sale"), approving the Sale of the Assets to

Piccadilly Investments, LLC (the "Buyer") over the objection (C.P. No. 186) filed by the FDOR.

9. On March 10, 2004, the Debtor filed the *Agreed Emergency Motion of Debtor to Amend Sale Order* (C.P. No. 397), which motion sought to amend the Order Approving Sale solely with respect to the method of payment to the Secured Noteholders, and did not affect the rights of any other party.

10. On March 15, 2004, the Court entered the *Order Granting Agreed Emergency Motion to Amend Sale Order* (C.P. No. 403) over the objection of the FDOR.

11. On March 16, 2004, the Debtor closed on the Sale of the Assets to the Buyer. The assets assigned and/or transferred from the Debtor to the Buyer at closing, as more particularly set forth in the *Asset Purchase Agreement* by and between the Debtor and Piccadilly Investments, LLC, as amended (the "APA"), included, among other things, the Debtor's interests in certain real property and leases. The assets sold constituted substantially all of the Debtor's assets.

12. On March 24, 2004, the FDOR filed the *Florida Department of Revenue's Motion for Reconsideration of Hearing and or Motion to Vacate Order Granting Emergency Motion of Debtor to Amend Sale Order, Vacating the Portion of the Amended Order and the Sale Order Granting the Debtor an 1146(C) Tax Exemption Prior to a Confirmed Plan* (C.P. No. 468). On May 21, 2004, the Court entered the *Order Denying Florida Department of Revenue's Motion for Reconsideration of Hearing and/or Motion to Vacate Order Granting Emergency Motion of Debtor to Amended Sale Order, Vacating the Portion of the Amended Order and the Sale Order Granting the Debtor an 1146(c) Tax Exemption Prior*

to a Confirmed Plan (C.P. No. 646). The FDOR filed a notice of appeal of said order, however, subsequently voluntarily dismissed the appeal.

13. On May 13, 2004, the FDOR filed the *Objection by Florida Department of Revenue to Debtor's Joint Disclosure Statement by Debtor, Piccadilly Cafeterias, Inc. and Official Committee of Unsecured Creditors* (C.P. No. 608).

14. On May 24, 2004, the Court entered the *Order Denying Florida Department of Revenue's Motion for Reconsideration of Hearing and/or Motion to Vacate Order Granting Emergency Motion of Debtor to Amended Sale Order, Vacating the Portion of the Amended Order and the Sale Order Granting the Debtor an 1146(c) Tax Exemption Prior to a Confirmed Plan* (C.P. No. 646).

15. On July 31, 2004, the Debtor and Creditors' Committee filed the *Amended Joint Chapter 11 Plan of Liquidation Proposed by Piccadilly Cafeterias, Inc., now known as Capital City Cornichon Corp., and the Official Committee of Unsecured Creditors* (C.P. No. 847) (the "Plan"). The Plan provides for, among other things, distributions to general unsecured creditors from the proceeds of the Sale (after payment of claims with higher priority classification).

16. On July 31, 2004, the Debtor and Creditors' Committee filed the *Amended Joint Disclosure Statement by Debtor and Official Committee of Unsecured Creditors in Support of Amended Plan of Liquidation* (C.P. No. 848).

17. On September 2, 2004, the FDOR filed the *Objection by Florida Department of Revenue to Amended Joint Chapter 11 Plan of Liquidation Proposed by Debtor, Piccadilly Cafeterias, Inc. now*

Known as Capital City Cornichon Corp. and the Official Committee of Unsecured Creditor (C.P. No. 944) and, on October 21, 2004, the FDOR filed the *Amended Objection by Florida Department of Revenue to Amended Joint Chapter 11 Plan of Liquidation Proposed by Debtor Piccadilly Cafeterias, Inc. now Known as Capital City Cornichon Corp., and the Official Committee of Unsecured Creditors and (2) Motion to Dismiss Case* (C.P. No. 1040) (collectively, the "Objection to Confirmation").

18. On October 21, 2004, the Court entered the *Order (1) Confirming Amended Joint Chapter 11 Plan of Liquidation Proposed by Piccadilly Cafeterias, Inc. of Unsecured Creditors, as Modified and (II) Setting Post Confirmation Status Conference* (C.P. No. 1044), overruling the FDOR's Objection to Confirmation.

19. Thereafter, on October 28, 2004, the FDOR filed the *Florida Department of Revenue's Motion for (1) Reconsideration of Confirmation and (2) Reconsideration of Department of Revenue's Amended Objection to Confirmation and Motion to Dismiss and (3) Motion for Stay* (C.P. No. 1075).

20. On November 5, 2004, the Plan Administrator filed the *Debtor's Response in Opposition to Florida Department of Revenue's Motion for (1) Reconsideration of Department of Revenue's Amended Objection to Confirmation and Motion to Dismiss and (2) Motion for Stay* (C.P. No. 1101).

21. On November 5, 2004, the Plan Administrator filed the *Debtor's Objection to Administrative Claim No. 1361 Filed by Florida Department of Revenue* (C.P. No. 1102) (the "Claim Objection"), which Claim Objection has been consolidated with this proceeding for adjudication pursuant to the *Order Sustaining In*

Part, Objection to Claim Number 1361 Filed By The Florida Department of Revenue.

22. On October 20, 2004, the FDOR commenced the instant action seeking a declaratory judgment that the Debtor's estate was liable in the amount of $39,200[1] with respect to amounts it alleges are due for payment of documentary stamps and recording fees with respect to the transfers of real property located in the State of Florida that the Debtor claimed as exempt based upon 11 U.S.C. § 1146 and the Sale Order.

Conclusions of Law

23. Based upon the foregoing, the Court hereby makes the following conclusions of law:

24. The transfer of substantially all of the assets of the Debtor, including the Florida properties, were transfers "under" the Plan because such transfer was necessary to consummate the Plan. The sale of substantially all of the assets of the Debtor contemplated the liquidating plan, which sale and plan were so interwoven that one could not proceed without the other.

25. Such transfer was necessary to the consummation of the confirmed Plan because the sale of the Debtor's assets generated the proceeds required to fund the Plan.

26. The delivery of the deeds subject of the Complaint are exempt from documentary, recording and other similar tax pursuant to 11 U.S.C. § 1146(c), and the interpretation thereof by the Eleventh Circuit.

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[1] This amount is based upon the Second Amended Complaint filed on November 23, 2004. The original complaint demanded judgment in the approximate amount of $2 million.

See *In re T.H. Orlando, Ltd.*, 391 F.3d 1287 (11th Cir. 2004).

27. There are no genuine issues of material fact with respect to the Plaintiff's *Second Amended Complaint* (C.P. No. 6) (the "Complaint").

28. Accordingly, the Defendant's Summary Judgment Motion is GRANTED for the reasons stated in the Defendant's Summary Judgment Motion, in the record, and in open Court, and the FDOR Summary Judgment Motion is DENIED.

29. The Court shall enter a separate Final Summary Judgment in favor of the Defendant, Piccadilly Cafeterias, Inc., now known as Capital City Cornichon Corp., and against the Plaintiff, State of Florida, Department of Revenue.

ORDERED in the Southern District of Florida on 03/08/06.

_____

Raymond B. Ray, Judge
United States Bankruptcy Court

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APPENDIX E

11 U.S.C. § 1146. Special Tax Provisions.

(a) The issuance, transfer, or exchange of a security, or the making or delivery of an instrument under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

OPPOSITION BRIEF

72

FILED
NOV 9 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 07-312

IN THE
Supreme Court of the United States

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Petitioner,

v.

PICCADILLY CAFETERIAS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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Attorneys for Respondent

QUESTION PRESENTED

Whether a State may apply a stamp or similar tax to a transfer of property ordered by a federal court from a federal bankruptcy estate.

CORPORATE DISCLOSURE STATEMENT

Piccadilly Cafeterias, Inc. is now known as Capital City Cornichon Corporation. Capital City Cornichon Corporation is wholly owned by an individual, Soneet Kapila as Plan Administrator.

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PRELIMINARY STATEMENT

This case arises from the chapter 11 bankruptcy case of Respondent Piccadilly Cafeterias, Inc. ("Piccadilly"). Petitioner is the State of Florida, Department of Revenue ("Florida"). The issue is whether Florida may tax a court-ordered transfer of property from Piccadilly's chapter 11 bankruptcy estate to a third-party purchaser of Picadilly's assets.

Piccadilly filed its chapter 11 bankruptcy petition on October 29, 2003. By operation of law, when Piccadilly commenced its bankruptcy proceeding, all of its property became vested in its bankruptcy estate, and the presiding bankruptcy judge became vested with exclusive jurisdiction over the estate. 11 U.S.C. § 541; 28 U.S.C. § 1134. At the time it filed its bankruptcy case, Piccadilly had already concluded that it should sell its assets quickly in order to maximize the amount that it could obtain for them. Thereafter, Piccadilly obtained the bankruptcy court's authorization to sell its assets to the highest bidder at auction. At the conclusion of the auction, Piccadilly Investments, LLC ("PI") was the highest bidder.

On February 13, 2004, Piccadilly closed the sale of its assets to PI. On October 21, 2004, the bankruptcy court approved Piccadilly's chapter 11 plan, which provided for, among other things, distributions to Piccadilly's creditors from the proceeds from the sale of its assets. Florida contends that it is entitled to impose a tax in the amount of $32,200 on the transfer of certain assets from Piccadilly's bankruptcy estate to PI.

Citing section 1146(c) of the Bankruptcy Code, 11 U.S.C. § 1146(c),[1] the bankruptcy court ruled that Florida is not entitled to tax the transfer of assets from Piccadilly's bankruptcy estate to PI. Section 1146(c) provides that "[t]he making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax." 11 U.S.C. § 1146(c). The bankruptcy court reasoned that, even though Piccadilly transferred its assets prior to actually confirming its plan, the transfer was part of a sale of Piccadilly's assets that was necessary in order to consummate the plan and make distributions to creditors from the proceeds. On appeal, the district court affirmed, as did the Eleventh Circuit.

The decision of the Court of Appeals in this case provides no occasion for certiorari review. To the extent that some aspects of the Eleventh Circuit's decision are inconsistent with aspects of the decisions of other courts of appeals, this case neither requires nor presents the appropriate vehicle for the Court's intervention.

First, whatever disagreement exists among the courts of appeals on the question presented is spread merely between three decisions, one each of the

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[1] Section 1146(c) has subsequently been recodified as 11 U.S.C. § 1146(a) pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The substance of the provision has not changed, and for ease of reference, the provision is referred to herein as section 1146(c). *See* Pet. App. 11a n.3.

Eleventh, Third, and Fourth Circuits. Further development of the relevant issues in the courts of appeals is warranted and may, in fact, resolve any controversy that exists currently. Among other things, Florida's petition for writ of certiorari suggests that the decision of the Eleventh Circuit in this case conflicts with a prior decision of the same circuit, *In re T.H. Orlando Ltd.*, 391 F.3d 1287 (11th Cir. 2004). Pet. 16. It is more than conceivable that the alleged conflict between the two decisions within the Eleventh Circuit may be resolved ultimately in a manner that eliminates any dispute among the Courts of Appeals.

Second, the decision of the Eleventh Circuit in this case purposefully declined to set forth a framework for determining the factual circumstances under which a State may or may not tax a transfer of property from a bankruptcy estate prior to confirmation of a chapter 11 plan. Specifically, the court stated that, because the parties had not briefed the issue of whether the bankruptcy court applied the correct analysis to the facts presented, "we leave for another day an attempt to set forth a framework for determining the circumstances under which § 1146(c)'s tax exemption may apply to pre-confirmation transfers." Pet. App. 9a. Thus, although the Third and Fourth Circuits have concluded that a State may tax a transfer of property from a bankruptcy estate that occurs prior to confirmation of a debtor's plan, the Eleventh Circuit, in concluding that a State may not do so, has left open the contours of the analysis that it has embraced.

Third, the decision below should be affirmed on an alternative ground that no other court of appeals has ruled upon. The precedents of this Court establish that a State cannot impose a tax on property that is held *in custodia legis* -- in the custody of the court. All property of a bankruptcy estate is held *in custodia legis*, and transfers of property from the estate -- as happened in this case -- are immune from state taxation. Among other reasons, States cannot tax transactions out of a bankruptcy estate because, if they could do so, a State could through the imposition of a tax effectively create a priority for itself in violation of the carefully articulated priority provisions of the federal Bankruptcy Code.

Fourth, the decision below construed correctly the ambiguous language of section 1146(c) in light of appropriate canons of interpretation, Congress's purpose in enacting the section, the legislative history, and the practical realities of chapter 11 reorganization cases. Further, as the dearth of appellate decisions on the issue indicates, Florida's petition presents no issue of extraordinary public importance warranting this Court's intervention.

Finally, the Court should deny Florida's petition because Florida failed to take an appeal of the order approving the sale of Piccadilly's assets to PI, and Florida likewise failed to seek or obtain a stay of the sale pending its appeal. Pursuant to section 363(m) of the Bankruptcy Code, 11 U.S.C. § 363(m), Florida cannot upset the sale and its appeal may be held to be moot. In sum, the petition presents no issue worthy of certiorari review and should be denied.

STATEMENT OF THE CASE

Prior to commencing its chapter 11 bankruptcy case, Piccadilly was one of the largest cafeteria chains in the United States. Pet. App. 12a. After determining that an asset sale would best serve its goal of maximizing its enterprise value, Piccadilly considered several offers from entities seeking to purchase its assets. *Id.* On October 28, 2003, Piccadilly executed an asset purchase agreement with Piccadilly Acquisition Corporation ("PAC") that provided that PAC would purchase substantially all of Piccadilly's assets for $54 million. *Id.* The next day, October 29, 2003, Piccadilly filed its chapter 11 bankruptcy petition, together with a motion seeking leave to sell substantially all of its assets outside of the ordinary course of business under 11 U.S.C. § 363(b)(1). *Id.* The motion sought exemption from the imposition of any stamp or similar tax on the basis that the proposed asset sale was "under a plan" within the meaning of 11 U.S.C. § 1146(c). *Id.* The motion stated that "[t]he Debtor intends to use the proceeds of the Sale as the basis for its plan under a liquidating Chapter 11 process. . . . Consummation of the Sale to Purchase is necessary to the consummation of any plan." *Id.* at 12a-13a.

Piccadilly sought and obtained leave of the bankruptcy court to conduct an auction that would award the right to purchase Piccadilly's assets to the highest bidder. Pet. App. 13a. PI made the winning bid of $80 million. On January 26, 2004, Piccadilly, together with a committee of senior secured noteholders and a committee of unsecured creditors, entered

into a global settlement agreement ("Global Settlement"), which resolved consensually the priority of distribution among Piccadilly's creditors. *Id.* at 3a. On February 13, 2004, the bankruptcy court approved the sale to PI, and the asset sale closed on March 16, 2004. *Id.* at 14a. According to Florida, it is this transfer that entitles the State to collect the relevant tax. *Id.* The bankruptcy court approved the Global Settlement on February 25, 2004. *Id.* at 15a.

Piccadilly filed its initial chapter 11 plan of reorganization and disclosure statement on March 25, 2004, and its amended joint chapter 11 plan of liquidation (the "Plan") and disclosure statement on March 26, 2004, which the bankruptcy court confirmed on October 21, 2004. *Id.* Throughout the proceedings, Florida maintained that it was entitled to collect a tax and took many steps to protect its interest. *Id.* at 15a-17a. These efforts culminated in the adversary proceeding it filed on October 20, 2004 which gave rise to the Petition now before the Court. *Id.* at 17a. Both Piccadilly and Florida filed cross-motions for summary judgment in the adversary proceeding, and at oral argument, Piccadilly argued that "[t]here would be no plan in this case had there not been the sale of this property, had there not been the global settlement agreement that set up the sale of the property and that set up the framework of the plan." *Id.* Even Florida conceded at that argument that "the actual sale itself contemplated the liquidating plan." *Id.*

In the end, the bankruptcy court granted Piccadilly's motion for summary judgment and denied Florida's motion, holding that "[t]he transfer of sub-

stantially all of the assets of the Debtor, including the Florida properties, were transfers 'under' the Plan because such transfer was necessary to consummate the Plan. The sale of substantially all of the assets of the Debtor contemplated the liquidating plan, which sale and plan were so interwoven that one could not proceed without the other." *Id.* at 40a. The bankruptcy court added that "[s]uch transfer was necessary to the consummation of the confirmed Plan because the sale of the Debtor's assets generated the proceeds required to fund the Plan." *Id.*

Florida appealed to the district court on the following issue: "Whether 11 U.S.C. § 1146(c), which exempts certain transfers made pursuant to a confirmed plan of reorganization from the imposition of stamp or similar tax, applies where a transfer is made pre-confirmation, pursuant to an order under 11 U.S.C. § 363, notwithstanding the limiting language of 1146(c)." Pet. App. 11a. The district court noted that "the Third and Fourth Circuits *are the only circuit courts to squarely address the issue.*" *Id.* at 19a. The district court stated that a "plain meaning" analysis "did not yield any clear answer to the question," *id.* at 25a, and that "under" was used frequently in the Bankruptcy Code and that the term was not subject to a single definition, *id.* at 26a. Citing a prior Eleventh Circuit case, *In re T.H. Orlando, Ltd.*, 391 F.3d 1287 (11th Cir. 2004), the court stated that "in the absence of any language imposing a temporal requirement, the undersigned does not believe it to be the duty, or prerogative, of the Court to impose one." Pet. App. 27a. Focusing on Congress's purpose in enacting section 1146, which was "to fa-

cilitate reorganizations through giving tax relief," *id.*, the district court also commented on the practical realities of chapter 11 reorganizations:

> [T]he instant case presents a perfect example of the perils of imposing an arbitrary temporal requirement. As noted, Debtor initially received a $54 million offer for its assets; only a few months later, Debtor sold its assets for $80 million. Neither party disputes that the vagaries of the market often dictate that time is of the essence and that waiting for a plan to be confirmed before making a sale will often be detrimental, or even fatal, to the ultimate confirmation of the plan. The undersigned declines to adopt an interpretation that will effectively remove most transactions in furtherance of confirmation plans from the reach of the exemption.

Id. at 28a.

In affirming the bankruptcy court's decision, the district court "emphasize[d] that [the Court] ha[d] been presented with the limited question of '[w]hether 11 U.S.C. § 1146(c) . . . applies where a transfer is made pre-confirmation.'" Pet. App. 28a. Thus, the court's opinion "only addresse[d] whether section 1146's tax exemption *may be* applied, as a general proposition, to pre-confirmation transfers." *Id.*. The district court declined to reach the question whether the bankruptcy court appropriately applied the exemption to the specific pre-confirmation asset transfer at issue because it had not been addressed by the parties. *Id.* Specifically, the district court de-

clined to reach "whether a confirmation plan need be filed with the bankruptcy court and/or contemplated by the parties in order for the 1146(a) exemption to apply." *Id.* at 29a.

Florida appealed and the Eleventh Circuit affirmed the district court's decision, holding in a *per curiam* decision that the section 1146(c) tax exemption "may apply to those pre-confirmation transfers that are necessary to the consummation of a confirmed plan of reorganization, which, at the very least, requires that there be some nexus between the pre-confirmation transfer and the confirmed plan." *Id.* at 8a-9a. The Eleventh Circuit declined to follow the "restrictive interpretation adopted by the Third and Fourth Circuits" for a number of reasons. *Id.* at 8a. It concluded that the "better reasoned approach" is one that "looks not to the timing of the transfers, but to the necessity of the transfers to the consummation of a confirmed plan of reorganization." *Id.* at 7a. Like the district court, the Eleventh Circuit found the plain language of section 1146(c) to be ambiguous, "as the statute can plausibly be read either as describing eligible transfers to include transfers 'under a plan confirmed' regardless of *when* the plan is confirmed *or*, as the DOR argues, imposing a temporal restriction on when the confirmation of the plan must occur." *Id.*

The court reasoned that when Congress wants to "place a temporal restriction in the Bankruptcy Code it [does] so expressly," *Id.* at 7a (citing examples); and that although tax exemptions might be narrowly construed, courts are "not to abrogate the purpose of the exemption through too narrow an application,"

id. at 8a (citation and internal quotation marks omitted). With respect to practicalities, the court noted that "it is just as probable that a debtor may need to close a sale as a condition precedent to the parties' willingness to proceed with confirmation of a plan as it is for the parties to agree on the terms of a plan, obtain confirmation, and then determine what the sale will bring." *Id.*

Like the district court, the Eleventh Circuit "emphasize[d] that the issue of whether the bankruptcy court properly applied the § 1146(c) tax exemption to the asset sale in this case has not been briefed by the parties and is not properly before us. Hence, we do not decide this issue." *Id.* at 9a. The court concluded that because the parties' arguments "focus[ed] on whether, as a general proposition, the § 1146(c) tax exemption *may* apply to pre-confirmation transfers," it would "leave for another day an attempt to set forth a framework for determining the circumstances under which § 1146(c)'s tax exemption may apply to pre-confirmation transfers." *Id.*

REASONS FOR DENYING THE PETITION

Florida's petition challenges the Eleventh Circuit's holding that the stamp-tax exemption pursuant to 11 U.S.C. § 1146(c) may apply to pre-confirmation transfers that are necessary to the consummation of a confirmed chapter 11 plan of reorganization. The Petition provides no basis for certiorari review and should be denied.

First, the decision below does not present a proper vehicle for review. Although there is some disagreement among the courts of appeals, only three

decisions are involved: one each from the Third, Fourth, and Eleventh Circuits. Further, the Third and Fourth Circuits reached the same conclusion for different reasons, and none of the other circuits (apart from the Eleventh) have addressed the issue presented. Further, Florida suggests that the decision below conflicts with a prior decision by the same court, *In re T.H. Orlando, Ltd.*, 391 F.3d 1287 (11th Cir. 2004), Pet. 16, and the Eleventh Circuit itself ultimately may resolve this purported conflict in a way in that eliminates any conflict among the courts of appeals altogether.

Second, the Eleventh Circuit itself has not fully articulated its position on the question presented, expressly declining to set forth a framework for determining the circumstances under which section 1146(c) would apply to pre-confirmation transfers. In such circumstances, it would be better to allow the issue to develop further among the lower courts.

Third, the decision of the Eleventh Circuit should be affirmed on an alternative ground that none of the other courts of appeals have addressed. Specifically, this Court's precedents establish that a state may not tax property that is *in custodia legis*, that is, in the custody of a federal court. Although not raised by the parties or the courts below, the relevant legal principles demonstrate that the Eleventh Circuit's decision was correct. At the moment a debtor files its chapter 11 petition, the exclusive *in rem* jurisdiction of the bankruptcy court attaches to a debtor's property and the debtor's bankruptcy estate. Because Piccadilly's property was in the bankruptcy court's custody, Florida has no right to tax the estate or

transfer from it. Because bankruptcy law demands uniform administration with respect to all creditors of a collective proceeding, the bankruptcy law binds the States no less than private parties. Individual creditors, including a State, may not "opt out" of the process and assert their own priorities contrary to the Bankruptcy Code's priority scheme, including tax priorities. This Court's precedents make clear that if the State were allowed to "pull out chunks of an estate" from the bankruptcy court in the form of taxes and tax liens, for example, it would seriously impair the ability of the bankruptcy court to perform its critical functions of administering the estate and promulgating a reorganization plan. *Gardner v. New Jersey*, 329 U.S. 565, 576 (1947); *see also New York v. Irving Trust Co.*, 288 U.S. 329, 332 (1933); *Van Huffel v. Harkelrode*, 284 U.S. 225, 228 (1931).

Fourth, the decision of the Eleventh Circuit correctly construed the statutory language "under a plan confirmed" contained in 11 U.S.C. § 1146(c). The text is ambiguous, as it can be read to include transfers "under a plan confirmed" regardless of when the plan is confirmed at the time of the transfer, or as imposing a temporal restriction on when confirmation must occur. Thus, the plain language of the statute, standing alone, cannot resolve the question whether the fact or the timing of plan confirmation is the critical issue. The Bankruptcy Code does not define the term "under" or the phrase "under a plan confirmed." Dictionary definitions of "under" are too numerous to be helpful, supporting both readings, and the presence of the word in nearly two hundred sections of the Bankruptcy Code does not

assist the inquiry. The Eleventh Circuit correctly reasoned that the liberal construction due a remedial statute such as the Bankruptcy Code and the fact that Congress's purpose in enacting section 1146 was to facilitate reorganization by giving tax relief outweigh the general canon of statutory construction, used by the Third and Fourth Circuits, that tax exemptions are to be narrowly construed. The legislative history and language of the predecessor statutes to section 1146 support the Eleventh Circuit's position, as do the practical realities of chapter 11 reorganization cases.

Finally, the Court should deny Florida's petition because, although Florida received notice of the sale of Piccadilly's assets to PI, Florida failed to appeal the bankruptcy court's order approving the sale or obtain a stay of that order pending appeal. Under section 363(m) of the Bankruptcy Code, Florida cannot now upset the sale and its appeal may be deemed to be moot. Indeed, the majority of courts follow a per se rule, deeming appeals from a sale order moot unless a stay is sought and obtained. Because Florida failed to take these steps, it may lack the ability to pursue its appeal.

A. This Case Does Not Present a Proper Vehicle for Certiorari Review.

Florida's Petition relies heavily on a circuit split. But the split is shallow, involving only three circuits: the Third and Fourth Circuits on one side, and the Eleventh Circuit on the other. Pet. App. 1a; *compare In re Hechinger Inv. Co. of Delaware, Inc.*, 335 F.3d 243, 252-54 (3d Cir. 2003); *In re NVR, LP*, 189 F.3d

442, 456-58 (4th Cir. 1999) *with In re Piccadilly Cafeterias, Inc.*, 484 F.3d 1299 (11th Cir. 2007). Moreover, the differences among the three circuits in their construction of section 1146(c) are not well defined. Accordingly, the Court should deny certiorari review and allow the issue presented to develop further among the circuits. This is especially true because Florida suggests that the decision below is inconsistent with a prior decision by the same court, *In re T.H. Orlando, Ltd.*, 391 F.3d 1287 (11th Cir. 2004). It is more than conceivable that any disagreement among the courts of appeals ultimately may be resolved if the suggested conflict is resolved within the Eleventh Circuit.

The Third and Fourth Circuits reached their conclusion that the section 1146(c) exemption applies only to asset transfers authorized by the terms of a previously confirmed chapter 11 plan in very different ways. In the Fourth Circuit's decision in *NVR*, the majority employed a textual approach, relying on dictionary definitions of the word "under" to conclude that pre-confirmation transfers could not be "subordinate to, or authorized by, something that did not exist at the date of transfer—a plan confirmed by the court." 189 F.3d at 456-57 ("the language of § 1146(c) is plain and requires no great manipulation to interpret its terms"). In contrast, the Third Circuit's decision in *Hechinger* recognizes that the word "under" can have many different meanings in different contexts. 335 F.3d at 252. Admitting that its reading of "under" is not "the only plausible interpretation" of the term, the court stated that "we cannot say that the language of Section 1146(c) rules out the possibil-

ity that 'under a plan confirmed' means 'in agreement with a plan confirmed.'" *Id.* at 253. Accordingly, the Third Circuit analyzed other parts of the Bankruptcy Code and two canons of construction to reach its conclusion. *Id.* at 253-54. No court of appeals has since issued a decision agreeing with the Third and Fourth Circuits, and because the two analyses differ so much it is evident that the purported disagreement among the circuits is not mature.

Moreover, in reaching a conclusion contrary to that of the Third and Fourth Circuits, the Eleventh Circuit "emphasized" that it decided only the "general proposition [] that the § 1146(c) tax exemption *may* apply to pre-confirmation transfers." Pet. App. 9a. Because the question whether the bankruptcy court properly applied the tax exemption in this particular case was not briefed by the parties, the Eleventh Circuit "le[ft] for another day an attempt to set forth a framework for determining the circumstances under which § 1146(c)'s tax exemption may apply to pre-confirmation transfers." *Id.* Thus, the court below has not yet had the opportunity to fully articulate its approach, and no other circuit has taken any position on the question.

Members of this Court have recognized that when evolving or "frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 25 n.1 (1995) (Ginsburg, J., dissenting) (citing *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., re-

specting denial of petitions for writ of certiorari) ("In my judgment it is a sound exercise of discretion for the Court to allow the various [lower courts] to serve as laboratories in which the issue receives further study before it is addressed by this Court.")). Allowing an issue to develop in the circuits permits "independent evaluation of a legal issue by different courts [and] a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule." Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 716 (1984).

The disagreement among the three courts of appeals on the issue presented is very recent and is sketched out only in broad terms, resulting in a shallow circuit split. This is just the sort of "evolving problem this Court need not, and . . . should not, resolve too hastily." *Arizona*, 514 U.S. at 25 (Ginsburg, J., dissenting). In these circumstances, when further development among the circuits is likely and likely beneficial, certiorari review should be denied.

B. The Decision Below Comports with this Court's Precedents Holding that the State Cannot Tax Property Held *in Custodia Legis*.

Certiorari review should be denied for the additional reason that the decision below comports with longstanding precedents of this Court holding that the State cannot tax property held by a court *in custodia legis*.

It is axiomatic that "[b]ankruptcy courts have exclusive jurisdiction over a debtor's property, wherever located, and over the [bankruptcy] estate." *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004) (citing 28 U.S.C. § 1334(e)). That exclusive jurisdiction attaches at the moment a chapter 11 petition is filed. *Straton v. New*, 283 U.S. 318, 320-21 (1931); *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. 300, 306-07 (1911); *see also Thinking Machines Corp. v. Mellon Fin. Servs. Corp. #1 (In re Thinking Machines Corp.)*, 67 F.3d 1021, 1025 (1st Cir. 1995) ("From the moment that a debtor's petition is filed in the bankruptcy court, the debtor's property is in *custodia legis*.").

The doctrine of *in custodia legis* "bars any attachment of funds in a court's registry that would prevent the court from disposing of the funds in accordance with the purpose for which they were deposited." *Landau v. Vallen*, 895 F.2d 888, 893-94 (2d Cir. 1990). Frequently invoked when "the order of one court interferes with the authority of another to dispose of a *res* within its custody," courts most often apply it in the bankruptcy context to "bar the efforts of creditors to obtain preferential status." *Id.* at 894 (citing cases).

The doctrine has long protected property in the hands of the bankruptcy court. *Ex parte Christy*, 44 U.S. (3 How.) 292, 11 L.Ed. 603 (1845) (Story, J.). Indeed, "[i]t is as true of the present law as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction." *Petrusch v. Teamsters Local 317 (In re*

Petrusch), 667 F.2d 297, 300 (2d Cir. 1981) (quoting *Mueller v. Nugent*, 184 U.S. 1, 14 (1902)).

Against this doctrinal backdrop, Florida's asserted entitlement to taxes cannot stand. Because the bankruptcy court must be able to perform its critical functions of marshalling the debtor's assets and adjusting and paying claims against those assets, *Straton*, 283 U.S. at 320-21; *Young v. Higbee Co.*, 324 U.S. 204, 210 (1945), no individual creditors, including the States and their subdivisions, may "opt out" of the process.

It is for this reason that this Court held that "[n]o good reason is suggested why liens for state taxes should be deemed to have been excluded from the scope of this general power [of the bankruptcy court] to sell free from incumbrances." *Irving Trust*, 288 U.S. at 333 (citation omitted). And further, that "[r]ealization upon the lien created by the state law must yield to the requirements of bankruptcy administration." *Id.* (citat ion omitted); *see also Van Huffel*, 284 U.S. at 228. And if this is so for tax liens, it is all the more so for taxes themselves. Thus, the Court concluded in *Irving Trust*,

> The Federal government possesses supreme power in respect of bankruptcies. If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated.

288 U.S. at 333 (citation omitted).

Similarly, the Court held in *Gardner* that the "reorganization court" possesses "broad powers over all types of liens." 329 U.S. at 576. Indeed, "while valid liens existing at the commencement of bankruptcy proceedings have always been preserved, it has long been a function of the bankruptcy court to ascertain their validity and extent and to determine the method of their liquidation." *Id.* Citing *Irving Trust* and *Van Huffel*, 284 U.S. 225, this Court has recognized that "in bankruptcy cases . . . the authority of the court to deal with the lien of a State has long been recognized." *Gardner*, 329 U.S. at 576. Were that not the case, "the assertion by a State of a lien would pull out chunks of an estate from the reorganization court and transfer a part of the struggle over the corpus into tax bureaus and other state tribunals." *Id.* at 577. This would "seriously impair the power of the court to administer the estate and . . . to promulgate a reorganization plan." *Id.* It would also "fly in the teeth" of the exclusive jurisdiction promised to the bankruptcy court by statute. *Id.*; *see* 28 U.S.C. § 1334.

Read together, these cases stand for the principle that the essential, core functions of the bankruptcy law bind the States, whether or not they consent, because the bankruptcy law demands the uniform administration against all creditors of a collective proceeding that affects the rights of many parties, including the States. If all creditors were not so bound, the bankruptcy court could not administer the estate in a systematic fashion consistent with the fundamental goals of bankruptcy law and the Constitution's Bankruptcy Clause itself. *Railway Labor Ex-*

ecutives' Ass'n v. Gibbons, 455 U.S. 457, 472 (1982) ("The Framers sought to provide Congress with the power to enact uniform laws on the subject [of bankruptcies] enforceable among the States.").

In sum, once property is in *custodia legis*, in the exclusive *in rem* jurisdiction of the bankruptcy court, the State may not tax the property or transfers of property from the estate for their own purposes. Moreover, because this alternative ground for affirmance has not been fully addressed by the courts of appeals in this context, the Court should deny Florida's petition for a writ of certiorari in this case.

C. The Eleventh Circuit Correctly Construed the Statutory Language "Under a Plan Confirmed" Contained in 11 U.S.C. § 1146(c).

Florida's arguments in support of its contention that it is entitled to collect taxes fare no better. Here, too, the principal cases upon which it relies are the Fourth Circuit's decision in *NVR* and the Third Circuit's decision in *Hechinger*. As discussed, the Fourth Circuit employed a textual approach to section 1146(c). Rejecting the reasoning of the lower courts that the necessity of the transfers to NVR's reorganization and emergence from bankruptcy satisfied section 1146(c)'s requirement that the transfers be made "under a plan confirmed," the Fourth Circuit held that "the language of § 1146(c) is plain and requires no great manipulation to interpret its terms." *NVR*, 189 F.3d at 457. Using dictionary definitions of the word "under," the Fourth Circuit reasoned that "we cannot say that a transfer made prior to the date of plan confirmation could be subor-

dinate to, or authorized by, something that did not exist at the date of transfer—a plan confirmed by the court." *Id.* Justifying its conservative reading of the statutory language, the court noted that "tax exemptions should be construed narrowly in favor of the state." *Id.*

The Fourth Circuit concluded that "[i]f a debtor is able to develop a chapter 11 reorganization and obtain confirmation, then the debtor is to be afforded relief from certain taxation to facilitate the implementation of the reorganization plan." *Id.* at 458. The next sentence reveals the misstep that led it and the Third Circuit astray: "Before a debtor reaches this point, however, *the state and local tax systems may not be subject to federal interference.*" *Id.* (emphasis supplied). As discussed above, this conclusion contravenes over a century of settled precedent concerning the *in custodia legis* doctrine and the exclusive *in rem* jurisdiction of the bankruptcy court.

Although it declined to take a textual approach, the Third Circuit reiterated in *Hechinger* the Fourth Circuit's emphasis on the canons of construction that "tax exemption provisions are to be strictly construed," and that "federal laws that interfere with a state's taxation scheme must be narrowly construed in favor of the state." 335 F.3d at 254. Like the Fourth Circuit, the Third Circuit missed the point that that it was the exclusive *in rem* jurisdiction of the bankruptcy court, holding Piccadilly's property *in custodia legis*, rather than a federal law that was "interfering" with the State's taxation scheme. Looking to other parts of the Bankruptcy Code for support, along with two canons of construction, *id.* at 253-54,

the Third Circuit construed the phrase "under a plan confirmed" to mean "authorized by a plan confirmed," and held that "a real estate transaction is made 'under a plan confirmed under section 1129' only where the sale is authorized by the terms of a previously confirmed Chapter 11 plan." *Id.* at 257. Because "the real estate transactions here were made pursuant to the authority conferred by other Bankruptcy Code provisions and occurred before the confirmation of a plan, those transactions were not entitled to the Section 1146(c) exemption from stamp taxes and similar taxes." *Id.*

In the decision below, the Eleventh Circuit reached a different conclusion, holding that "§ 1146(c)'s tax exemption may apply to those pre-confirmation transfers that are necessary to the consummation of a confirmed plan of reorganization, which, at the very least, requires that there be some nexus between the pre-confirmation transfer and the confirmed plan." Pet. App. 8a-9a. In other words, the *necessity* of the transfers to the confirmation of a plan, rather than the *timing* of the transfers, determines whether the State was entitled to tax the transfers. *Id.* at 7a. In reaching this conclusion, the Eleventh Circuit relied on an Eleventh Circuit opinion, *In re T.H. Orlando Ltd.*, 391 F.3d 1287 (11th Cir. 2004), that concluded that the phrase "'under a plan' refers to a transfer that is necessary to the consummation of a confirmed Chapter 11 plan." Pet. App. 6a (quoting 391 F.3d at 1292). Interestingly, *Orlando* itself readily harmonized the existing precedents, stating that *NVR* and *Hechinger* held that "under a plan" means "authorized by a plan con-

firmed," and that the Second Circuit's decision in *City of New York v. Jacoby-Bender*, 758 F.2d 840, 842 (2d Cir. 1985), recognized that "a chapter 11 plan *impliedly* authorizes any transfer that is necessary to the consummation of the plan." *Orlando*, 391 F.3d at 1291. In other words, "[a] transfer 'under a plan' refers to a transfer authorized by a confirmed Chapter 11 plan. In turn, a plan authorizes any transfer that is necessary to the consummation of the plan." *Id.*

Even if the doctrine of *in custodia legis* were not dispositive, the better reasoned approach is that taken by the Eleventh Circuit. To begin with, the text of the statute is ambiguous. As the Eleventh Circuit concluded, it can "plausibly be read either as describing eligible transfers to include transfers 'under a plan confirmed' regardless of *when* the plan is confirmed *or*, as [Florida] argues, imposing a temporal restriction on when the confirmation of the plan must occur." Pet. App. at 7a; *see also NVR*, 189 F.3d at 458-59 (Wilkinson, J., concurring) ("It is not plain to me that section 1146(c) contains a temporal element. It is also not clear that one must read the section to say anything about the relationship between plan confirmation and the timing of the transfer."). As Judge Wilkinson reasoned in *NVR*:

> It is equally possible that the provisions requires only that the transfer occur "under"—i.e., that it be inferior or subordinate to "a plan" that is ultimately "confirmed." In other words, the fact rather than the timing of plan confirmation is the critical issue. In a complicated reorganization a debtor-in-possession may operate for some time pursuant to the

> terms of an unconfirmed plan while it negotiates with its creditors.

Id.; *see also In re Beulah Church of God in Christ Jesus, Inc.*, 316 B.R. 41, 46 (Bankr. S.D.N.Y. 2004) ("'confirmed' as used in section 1146(c) may be read as either fixing the date of the transfer or describing a condition, which may be a condition subsequent."). The dictionary does not resolve the difficulty. *Id.* (listing various dictionary definitions of "under" as "subject to the restraint or obligation of: *under contract*," "subject to the authority, rule or control of: *under a dictatorship*," "in the process of: *under discussion*," and "in view of; because of: *under these conditions*"). Even the Third Circuit conceded that "[t]he preposition 'under' is of course very common, and it can have many different meanings in different contexts." *Hechinger*, 335 F.3d at 252 (noting that *Webster's Dictionary* listed 13 different definitions for the work "under," and that *Random House Dictionary* listed 27 definitions). This is the very essence of ambiguity.

Although *Hechinger* looked to other provisions in the Bankruptcy Code for guidance, *id.* at 253-54, on the basis that words in the Bankruptcy Code should have the same meaning, the word "'under' is used in nearly two hundred different sections of the Bankruptcy Code. When 'under' can be a preposition, adverb, adjective, noun, or verb, and it is used so frequently, . . . this canon of statutory interpretation is of little value." *Id.* at 258 (Nygaard, J., dissenting) (citation omitted).

While the Third and Fourth Circuits made much of the maxim that "tax exemptions are narrowly construed," the Eleventh Circuit correctly emphasized that "we are not to abrogate the purpose of the exemption through too narrow an application." Pet. App. 8a (quoting *Hechinger*, 335 F.3d at 259 (Nygaard, J., dissenting)). As the Eleventh Circuit noted, this is particularly true in view of the principle that "a remedial statute such as the Bankruptcy Code should be liberally construed." Pet. App. 8a. This approach supports Congress's purpose in enacting section 1146, which was "to facilitate reorganizations through giving tax relief." *Jacoby-Bender*, 758 F.2d at 841; *cf. NVR*, 189 F.3d at 459 (Wilkinson, J., concurring) (describing central purpose of the bankruptcy laws as "permitting business debtors to reorganize and restructure their debts in order to revive the debtors' businesses and thereby preserve jobs and project investors").

The legislative history of section 1146(c), while scant, supports the Eleventh Circuit's analysis. *Hechinger*, 335 F.3d at 259 n.2 (Nygaard, J., dissenting). The House Judiciary Committee Report states:

> Another provision that affects the method of taxation in bankruptcy applies only in chapter 11. Section 1146(c) of title 11 is *modeled after section 267 of the Bankruptcy Act* which exempts any security or transfer instrument dealt with under a confirmed chapter X plan from any State or Federal stamp tax. Section 1146(c) of title 11 *broadens* the exemption to any stamp tax or similar tax on a security or a transfer instrument dealt with under the con-

> solidated chapter 11. No opposition has been voiced with respect to this section.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 281 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963, 6238 (quoted in *Jacoby-Bender*, 758 F.2d at 841) (emphasis supplied).

Although section 267 had similar "under the plan" language, the "direct predecessor of section 267," section 77B(f), used the language "to *make effective* any plan." *Hechinger*, 335 F.3d at 259 n.2 (Nygaard, J., dissenting) (emphasis supplied). The import of this language was passed down to section 267 from section 77B(f). According to the Collier treatise, "the provisions of [section] *267* . . . make it clear that the exemption conferred relates only to transactions otherwise taxable which serve to execute *or make effective a plan* confirmed under Chapter X." *Id.* (quoting 6A COLLIER ON BANKRUPTCY ¶ 15.08 at 840 (14th ed. 1977)) (emphasis supplied). The Eleventh Circuit's construction is thus in accord with the history of section 1146(c). *See Jacoby-Bender*, 758 F.2d at 842 ("Quite clearly, 11 U.S.C. § 1146(c) of the Bankruptcy Code relates back, so far as state and local taxes are concerned, to section 267 of Chapter X of the old Bankruptcy Act.").

As the Eleventh Circuit noted in the decision below, "when Congress wanted to place a temporal restriction in the Bankruptcy Code, it did so expressly." Pet. App. 7a (listing examples). The examples listed by the Eleventh Circuit illustrate that "Congress knows how to create time limitations. When it wants to attach these restrictions to statutes, it does."

United States v. Wright, 48 F.3d 254, 256 (7th Cir. 1995); *see United States v. Naftalin*, 441 U.S. 768, 773 (1979) ("The short answer is that Congress did not write the statute that way."). No liberal reading triggered by the remedial nature of the Bankruptcy Code would supply a temporal limitation completely absent from the statutory text.

Finally, the Eleventh Circuit's approach properly takes account of the practical realities of chapter 11 reorganization cases. In the ordinary course, it is "just as probable that a debtor may need to close a sale as a condition precedent to the parties' willingness to proceed with confirmation of a plan as it is for the parties to agree on the terms of a plan, obtain confirmation, and then determine what the sale will bring." Pet. App. 8a. Bankruptcy courts, perhaps because they are closest to these practicalities, have been vocal on this point. *See, e.g., In re Webster Classic Auctions, Inc.*, 318 B.R. 216, 219 (Bankr. M.D. Fla. 2004) (stating that the reversal by *NVR* and *Hechinger* of bankruptcy court findings "perhaps impl[ies] the sometimes academic exercise of statutory interpretation may be overshadowing the practical realities of bankruptcy reorganization"); *id.* ("As Chapter 11 reorganization is a sophisticated process, this Court finds inserting an artificial preconfirmation v. postconfirmation line of demarcation into the § 1146(c) analysis fails to recognize the complexities the reorganizing debtor often faces."); *Beulah*, 316 B.R. at 50 ("As importantly, focusing on the role of the particular transfer at issue in enabling the debtor's plan, rather than on a temporal test, recog-

nizes the realities of how distressed businesses are restructured in chapter 11.").

* * * *

The foregoing points reinforce the argument that the certiorari review should not be granted on the basis of the shallow and ill-defined circuit split presented here. Again, only three circuits have weighed in on the issue raised in the Petition; the two circuits that have agreed as to the ultimate conclusion have done so for different reasons; and the Eleventh Circuit, on the other side, has expressly stated that it will "leave for another day an attempt to set forth a framework for determining the circumstances under which § 1146(c)'s tax exemption may apply to pre-confirmation transfers." Pet. App. 9a. To warrant certiorari review, a petition should present a fully defined and mature circuit split, one that reflects a thorough elucidation of the rationales behind, and the ramifications of, the respective positions of the circuit courts. This Petition does not come close to meeting that standard and is thus premature.

The Petition also presents no issue of extraordinary public importance warranting this Court's intervention. The Bankruptcy Code's provision governing exemption from stamp taxes, with minimal interpretation by the courts of appeals, does not present the extraordinary type of dispute that would justify this Court's intervention.

D. Any Claim by Florida Challenging the Bankruptcy Court's Order Approving the Asset Sale May Be Statutorily Moot under Section 363(m) of the Bankruptcy Code.

Although it received notice of the asset sale, Florida failed to appeal the bankruptcy court's February 13, 2004 order approving the sale and to request and obtain a stay pending appeal within ten days from the entry of the order. Accordingly, Florida's claim that the asset sale entitles it to collect taxes is statutorily moot.

The Bankruptcy Code leaves no doubt that a stay pending appeal is a precondition to an appeal from an order approving a sale of estate property under 11 U.S.C. § 363(m). *See* 11 U.S.C. § 363(m) ("The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, *unless such authorization and such sale or lease were stayed pending appeal.*"); Fed. R. Bankr. P. 8002(a).

This requirement serves important policies. *In re CGI Indus., Inc.*, 27 F.3d 296, 299 (7th Cir. 1994) (stating that two complementary policies support § 363(m)'s conclusion: (1) the importance of encouraging finality in bankruptcy sales by protecting good-faith purchasers; and (2) the court's general jurisdictional bar from deciding cases in which it cannot provide a remedy). It is therefore well settled that once

once a sale under section 363(b)(1) becomes final and a stay is not entered, the sale cannot be reviewed on appeal.

In construing 11 U.S.C. § 363(m), the majority of courts of appeals follow a per se rule, mooting appeals absent a stay. *Veltman v. Whetzal*, 93 F.3d 517, 521 n.4 (8th Cir. 1996) (affirming dismissal of appellant's appeal of bankruptcy court's order confirming sale of estate property free and clear of appellant's interest where appellants were provided with sufficient notice that property was to be sold free and clear of their interest and holding that failure of appellants to timely appeal order deprived the appellate court of jurisdiction); *United States v. Salerno*, 932 F.2d 117, 122-23 (2d Cir. 1991) (appeal moot where sale order is not stayed and the sale is consummated); *Anheuser-Busch, Inc. v. Miller (In re Stadium Mgmt. Corp.)*, 895 F.2d 845, 847 (1st Cir. 1990) ("The effect of § 363(m) is that when an order confirming a sale to a good faith purchaser is entered and a stay of that sale is not obtained, the sale becomes final and cannot be reversed on appeal . . . Absent a stay, the court must dismiss a pending appeal as moot because the court has no remedy that it can fashion even if it would have determined the issues differently.") (internal quotation marks and citations omitted); *Cargill, Inc. v. Charter Int'l Oil Co (In re The Charter Co.)*, 829 F.2d 1054, 1056 (11th Cir. 1987) ("Because [section 363(m)] prevents an appellate court from granting effective relief if a sale is not stayed, the failure to obtain a stay renders the appeal moot."); *Hicks v. Pearlstein (In re Magwood)*, 785 F.2d 1077, 1080 (D.C. Cir. 1986) (under section

363(m), where no stay has been obtained, court cannot reverse sale of property to good faith purchaser); *Vista Del Mar Assocs., Inc. v. West Coast Land Fund (In re Vista Del Mar Assoc., Inc.)*, 181 B.R. 422, 424 (B.A.P. 9th Cir. 1995) ("[W]hen an appellant fails to obtain a stay from an order that permits a sale of the debtor's asset, the appeal will be rendered moot regardless of whether the purchaser has taken irreversible steps following the sale."). The Eleventh Circuit follows the majority approach. *Charter Co.*, 829 F.2d at 1056.[2]

As this Court has long recognized, "the duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions." *Mills v. Green*, 159 U.S. 651, 653 (1895). This Court should deny the petition for the additional reason that Florida's challenges to the bankruptcy court's order approving the sale may be moot.

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[2] A minority of courts recognize a limited exception to the general proscription of section 363(m). *See Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 499 (3d Cir. 1998); *Golfland Entertainment Ctrs. v. Peak Inv., Inc. (In re BCD Corp.)*, 119 F.3d 852, 856 (10th Cir. 1997); *In re Lloyd*, 37 F.3d 271, 273 (7th Cir. 1994). Courts in these jurisdictions will not dismiss an appeal of a bankruptcy court's sale order pursuant to section 363(m) if the court is able to afford the appellant a "measure of effective relief" that would not affect the "validity" of the sale, even though the appellant failed to obtain a stay. *Krebs*, 141 F.3d at 499.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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REPLY BRIEF

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STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Petitioner,

v.

PICCADILLY CAFETERIAS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONER

Respondent explicitly acknowledges that a split exists among the circuit courts on the issue presented,[1] but claims it is "very recent and is sketched out only in broad terms, resulting in a shallow circuit split." Br. in Opp. 16. This assertion, however, is mistaken in a number of respects and ignores the important reasons why the disagreement among the circuits should be resolved now.

First, the circuit split is not "very recent" and, instead, has evolved over at least the past two decades. Indeed, the disagreement among the circuit courts finds it genesis over twenty years ago in the Second Circuit's decision in *In re Jacoby-Bender*, 758 F.2d 840 (2d Cir. 1985), upon which the Eleventh Circuit and other federal courts have relied for their conclusion that section 1146(c) (now 1146(a))[2] applies to transfers of assets, even those occurring months or years prior to the actual confirmation of a bankruptcy plan. It cannot be fairly said that the circuit split is of "very recent" vintage.

Moreover, the split has resulted in forum-shopping due to the lack of uniformity in this important area of the law, one at the intersection of the federal bankruptcy and state and local tax laws. Respondent is silent as to why this lack of uniformity and the inequities of forum-shopping should not be addressed and resolved now. Awaiting decisions from

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[1] Respondent's reframing of the issue as "Whether a State may apply a stamp or similar tax to a transfer of property ordered by a federal court from a federal bankruptcy estate" wholly ignores the key issue presented, which regards the conflicting interpretations of the language of section 1146(c) among the circuits.

[2] New section 1146(a) is referred to herein as section 1146(c) for convenience. Pet. App. 42a.

other circuits will achieve nothing, result in no greater insights on the issue presented, and merely delay much needed national uniformity of interpretation regarding section 1146(c).

Second, it is mistaken to say the circuit split is merely "sketched out only in broad terms" or "ill-defined" (Br. in Opp. 16 & 28) when the Eleventh Circuit itself explicitly disagreed with the reasoning and approaches of the Third and Fourth Circuits on the specific issue of the meaning of section 1146(c). Indeed, as set forth in the Department's petition (Pet. 9-17), courts and commentators alike recognize that the existing circuit split is well-defined, that it centers on the circuit courts' differing interpretations of section 1146(c), and that this Court's resolution of the matter is warranted. To claim the circuit split is sketchy or ill-defined is to ignore the obvious.

Third, the circuit split cannot be fairly characterized as "shallow" and, instead, is perhaps one of the deeper conflicts that exists in the federal system. The reason is that the circuit split is merely the tip of the appellate iceberg, with the federal district courts (acting in their appellate capacity) in sharp disagreement on the issue presented and the bankruptcy courts in all but disarray on section 1146(c)'s meaning.[3] This deep and widening split at all levels of the federal court system – with the circuit courts in conflict on an important question of federal law for which national uniformity truly matters – presents precisely the type of division that warrants

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[3] The amicus brief of the State of Illinois makes this point in citing but a few of the lower court decisions in disagreement on the issue presented. Illinois Amicus 2; *see also* Resp. in Opp. 24, 27 (citing bankruptcy court decisions favorable to Respondent's position).

this Court's intervention. *See* Supreme Court Rule 10 (a) & (c) (character of reasons considered in granting certiorari include when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or when a "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court[.]). The amicus brief in support of the Department, adopted by twenty-two states, Puerto Rico, and three major cities, makes this point emphatically. Illinois Amicus 7-10.

Next, Respondent raises an exceptionally odd issue, neither raised below nor apparently addressed or adopted by any court. Respondent asserts the novel theory that simply because a bankruptcy court obtains jurisdiction over the property of a debtor, a state or local government may not impose any tax on such property whatsoever. Pet. in Opp. 16-20. This proposition makes no sense. While it makes sense that a bankruptcy court has custodial powers over a debtor's property to effectuate the purposes of the bankruptcy laws, it is neither logical nor realistic to claim that this jurisdictional power somehow entirely overrides state and local taxation laws. One must wonder why Congress would have enacted a statute such as section 1146(c), which empowers a bankruptcy court to approve an exemption from stamp and similar taxes imposed by state and local governments, if the power to tax were ipso facto extinguished by the mere filing of a bankruptcy petition in the first instance.

Moreover, Respondent also fails to explain how its novel, untested theory can coexist with other

provisions of the Bankruptcy and U.S. Codes,[4] which are replete with provisions recognizing that the bankruptcy estate and its property are subject to non-discriminatory state taxes of general applicability. Further, Respondent overlooks that this Court in *California State Board of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989), rejected the notion that a trustee is immune from taxation, even on liquidating sales, under the intergovernmental tax immunity doctrine. No basis exists to distinguish between sales taxes on sales of personal property and real estate transfer taxes on sales of real property. In short, whether the decision below comports with Respondent's peculiar "*in custodia legis*" theory of tax immunity is simply irrelevant to the question presented, and a diversion from the importance of the circuit split at issue.

Respondent's third point is that review is unwarranted because the Eleventh Circuit's decision is correct. If the correctness of a circuit court's decision precluded this Court's review, as Respondent suggests, many important circuit splits would go

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[4] *See, e.g.*, 28 U.S.C. § 960 (officers and agents conducting business under authority of U.S. courts "shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.") (establishing guidelines for payment of such taxes); 11 U.S.C. § 362(b)(9) (automatic stay does not apply to audits, issuance of notices of tax deficiency, demand for tax returns, or issuance of assessments); 11 U.S.C. § 362(b)(18) (creating exception from the automatic stay for creation or perfection of statutory liens for ad valorem taxes or assessments due after the petition date); 11 U.S.C. § 503(b)(1)(B) (granting administrative claim status to taxes incurred by the estate); 11 U.S.C. § 505(b) (establishing a process for prompt determination of taxes incurred by the estate); 11 U.S.C. § 1112(b)(4)(I) (providing for conversion or dismissal of chapter 11 case for failure to timely file returns or pay post-petition taxes).

unresolved. It is obvious, however, that the correctness of a circuit court's decision matters less than the need to resolve an important circuit split like the one at issue. Indeed, if the Eleventh Circuit is correct, it would seem to strengthen Respondent's resolve that this Court grant review and resolve the circuit split on the issue actually addressed below and presented in the petition.

Finally, Respondent claims that the Department should have attempted to stay the bankruptcy court order approving the sale of the debtor's property below under section 363(m) of the Bankruptcy Code, and that the failure to do so somehow operates as a bar to the Department's attempt to collect taxes on the sale. Like its "*in custodia legis*" theory of tax immunity, this claim is nonsensical for at least three reasons.

First, why a state seeking to collect taxes on the sale of a debtor's property would seek to stop the sale itself via a stay (or reverse a completed sale) is far from obvious. Here, the Department has absolutely no interest in staying or reversing the sale of the Respondent's assets; instead, it sought only to collect tax revenues on the sale to ensure that Florida's revenue laws are applied uniformly and fairly within the strictures of the bankruptcy laws, including section 1146(c).

Second, section 363(m) has no application in the context of a state challenging a tax exemption under section 1146(c). Indeed, none of Respondent's cases involve section 1146(c) and none remotely apply to the fact pattern at issue, each involving efforts to stop or reverse sales of property. The Department, as mentioned, has no interest in stopping or reversing the sale below – it merely wants to collect taxes on the sale unless properly exempted under section 1146(c). The Department is not challenging the authorization

Respondent obtained to make the sale; instead, it is challenging the exemption that Respondent obtained under section 1146(c).

Third, it is ironic that if the sale were stopped or undone (as Respondent claims is required), no transfer tax would be due in the first place. Thus, to accept Respondent's argument – that the Department's claim "may be moot" (Res. in Opp. 31) because the Department did not stop or attempt to reverse the sale below – is to accept an absurd proposition. The issue presented is not moot and Respondent's argument based on section 363(m) is makeweight.

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For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted and the case set for briefing and oral argument.

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AMICUS CURIAE BRIEF

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v.

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RESPONDENT.

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BRIEF FOR THE STATES OF ILLINOIS, ARKANSAS, COLORADO, HAWAII, IOWA, KANSAS, MAINE, MASSACHUSETTS, MICHIGAN, NEVADA, NEW HAMPSHIRE, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, VERMONT, WASHINGTON, WISCONSIN, WYOMING, THE COMMONWEALTH OF PUERTO RICO, THE CITY OF CHICAGO, THE CITY & COUNTY OF DENVER, AND THE CITY & COUNTY OF SAN FRANCISCO, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether § 1146(a) of the Bankruptcy Code, which exempts from stamp or similar taxes any asset transfer "under a plan confirmed under section 1129 of the Code," applies to transfers of assets occurring prior to the actual confirmation of such a plan.

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INTEREST OF THE *AMICI CURIAE*

At issue in this case is whether the tax exemption found in the Bankruptcy Code at 11 U.S.C. § 1146(c)[1] applies to property sales undertaken before a plan of reorganization is confirmed, or whether the exemption is limited to transfers made pursuant to a confirmed plan. This is an issue of critical importance to state, county and municipal taxing authorities. Section 1146(c) exempts principally the real estate transfer tax,[2] and thirty seven states—at the state, county and/or municipal level—impose such a tax on the recording of deeds, mortgages and/or lease assignments.[3] While this tax is usually a small percentage of the consideration paid, it accounts for billions of dollars in revenue to state and local governments nationwide.[4]

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[1] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 719(b)(3)(B), 119 Stat. 23, deleted former sub-sections (a) and (b) of § 1146, and former subsection (c) is now sub-section (a). Because this bankruptcy case pre-dates the change in the statute, *amici* will refer to the applicable section as § 1146(c).

[2] Debtors' counsel regularly file sale motions seeking to extend the exemption to cover sales and use taxes, UCC filing fees, gains taxes and other taxes and fees. *See* Karen Cordry, *The Incredible Expanding Section 1146(c)*, 21 Am. Bank. Inst. J. 10 (Dec.-Jan. 2003). To date, there are no reported decisions extending the exemption in this manner.

[3] A list of these states is available at www.realtor.org/smart_growth.nsf/docfiles/TransferTaxRates(8-05).pdf.

[4] For example, transfer tax collections for fiscal year 2006 for the State of Washington were $1.010 billion (see dor.wa.gov/docs/reports/2007/Tax_Reference_2007/50reet.pdf at p. 202), for the State of Florida were $4.105 billion (see

Prior to the Eleventh Circuit's decision in this case, only the Third and Fourth Circuits had addressed whether § 1146(c) exempts taxes on pre-confirmation transfers, and both of these courts rejected the idea. *See In re Hechinger Inv. Co. of Delaware, Inc.*, 335 F.3d 243, 257 (3d Cir. 2003); *In re NVR, LP*, 189 F.3d 442, 456-58 (4th Cir. 1999). Elsewhere, the lower courts have split. Compare *In re Beulah Church of God in Jesus Christ, Inc.*, 316 B.R. 41 (Bankr. S.D.N.Y. 2004), *In re Linc Capital, Inc.*, 280 B.R. 640 (Bankr. N.D. Ill. 2002), *In re Permar Provisions, Inc.*, 79 B.R. 530 (Bankr. E.D.N.Y. 1987), and *In re Smoss Enters. Corp.*, 54 B.R. 950 (E.D.N.Y. 1985) (all declaring some pre-confirmation sales to be tax exempt), with *States of Illinois & Washington v. Nat'l Steel Corp.*, 2003 WL 22089881, 50 Collier Bankr. Cas.2d 1409 (N.D. Ill. Sept. 9, 2003) (limiting exemption to sales made pursuant to a confirmed plan). The circuit split that the Eleventh Circuit has created, and the divide among lower courts, result in the uneven application of the Bankruptcy Code and state and local tax laws. This case provides an ideal vehicle for resolving this split in authority on a question of national importance.

STATEMENT

Factual Background and Proceedings Below

On October 28, 2003, Piccadilly Cafeterias, Inc. ("Piccadilly") entered into an asset purchase agreement with

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dor.myflorida.com/dor/tables/f2fy2006.xls), for the State of New York were $938.144 million (see www.tax.state.ny.us/pdf/taxnews/2006_ann_rep.pdf at p. 22), and for the City of New York general fund were $1.352 billion in mortgage recording taxes and $1.305 billion in conveyance of real property taxes (see www.comptroller.nyc.gov/bureaus/acc/cafr-pdf/cafr2006.pdf at p. 260).

Piccadilly Acquisition Corporation, in which the latter agreed to acquire Piccadilly's assets (chiefly property) in exchange for $54 million. Pet. App. 2a. The next day, Piccadilly filed a Chapter 11 bankruptcy petition and a motion under § 363 of the Bankruptcy Code for an order authorizing an auction of Piccadilly's assets, using the offer of Piccadilly Acquisition Corporation as the opening minimum bid. *Id.* at 2a, 13a. Piccadilly's motion also asked the bankruptcy court to declare the resulting sale exempt from stamp taxes under § 1146(c). *Id.*

The bankruptcy court entered an order on December 4, 2003 approving the bidding process and establishing an auction date. *Id.* at 2a-3a. The winning bidder at auction was Piccadilly Investments, LLC (no relation to the debtor or Piccadilly Acquisition Corporation) who bid $80 million. *Id.* at 3a. On February 13, 2004, the bankruptcy court approved the sale and held, over the State of Florida's ("Florida") objection, that the sale was exempt from stamp taxes under § 1146(c). *Id.* One month later, the bankruptcy court entered an amended order approving the sale and denying Florida's motion to reconsider the sale order, and the sale closed on March 16, 2004. *Id.*

Piccadilly filed its initial proposed liquidation plan ten days later, and subsequently filed an amended plan, to which Florida objected. *Id.* Florida also initiated an adversary proceeding seeking a declaration that § 1146(c) did not exempt the asset sale from stamp taxes. *Id.* On October 21, 2004, the bankruptcy court confirmed the amended liquidation plan, over Florida's renewed objection. *Id.*

In the adversary proceeding, both Florida and the debtor moved for summary judgment. *Id.* The bankruptcy court ruled that the § 1146(c) exemption applied—although the sale occurred well before the plan was proposed and at least seven months before it was confirmed—on the ground that the sale was necessary for consummation of the plan. *Id.*

The district court, and then the Eleventh Circuit, affirmed. *Id.* at 3a-4a, 9a. The court of appeals rejected the argument that § 1146(c) exempts only post-confirmation sales, holding that even pre-confirmation transactions take place "under a plan confirmed" whenever they are "necessary to the consummation of a confirmed plan." *Id.* at 9a.

Statutory Background

There has long been federal legislation exempting from taxation the issuance of securities or the making or delivery of instruments of transfer under a confirmed bankruptcy plan. The first such law was the Bankruptcy Act of 1934, which exempted from federal transfer taxes "[t]he issuance, transfers, or exchanges of securities or making or delivery of conveyances to make effective any plan of reorganization confirmed under the provisions of this section." 48 Stat. 911, 919 (1934). In 1938, the Chandler Act replaced this provision with one that extended the exemption to both state and federal taxes. See 52 Stat. 840, 903-04 (1938) ("The issuance, transfer, or exchange of securities, or the making or delivery of instruments of transfer under a plan confirmed under this chapter, shall be exempt from any stamp taxes now or hereafter imposed under the laws of the United States or any State."). Meanwhile, the Internal Revenue Code of 1954 included a parallel exemption from federal documentary stamp taxes on the exchange of securities or the making, delivery or filing of conveyances in corporate and railroad reorganizations confirmed under the Bankruptcy Act or approved in equity receivership proceedings, so long as the transfers occurred within five years of the confirmation or approval. 26 U.S.C. § 4382(b) (1972) (repealed).

While there are no reported decisions construing these exemptions in the Chandler Act and the Internal Revenue Code, the leading bankruptcy treatise proclaimed that they "do not extend any exemption to transactions (that is, transfers,

issuance, etc.) *which occur prior to confirmation of the plan and which are mere preparatory steps*." 6A Collier on Bankruptcy ¶ 15.08, at 840 (14th ed. 1977) (emphasis added).

When Congress enacted the Bankruptcy Reform Act of 1978, the stamp tax exemption provisions were included in § 1146(c), which was modeled after the exemption in the Bankruptcy Act. *See* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 421 (1977). Section 1146(c) now provides: "The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax." 11 U.S.C. § 1146(c). It is the language limiting the tax exemption to transfers "under a plan confirmed" that forms the basis of the instant dispute and is the subject of a developed split among the federal courts.

REASONS FOR GRANTING THE WRIT

The question that this case presents—at the intersection of bankruptcy and tax law—is of paramount importance to States and other taxing authorities. Florida's certiorari petition thoroughly describes the circuit and lower court split implicated by the Eleventh Circuit's holding that sales consummated before plan confirmation may be sales made "under a plan" for purposes of § 1146(c)'s tax exemption. The uneven application of bankruptcy law, with its profound implications for state and local taxing bodies, counsels powerfully for Supreme Court review. But the need for uniformity is particularly acute here, for the Bankruptcy Code affords debtors substantial latitude in selecting a venue for bankruptcy filing, and the conflict deepened by the Eleventh Circuit's decision opens the door wide to strategic forum shopping.

Beyond this, the question over which the federal courts are divided—a question implicated squarely by the Eleventh Circuit's decision here—is of significant practical importance,

as parties increasingly use pre-plan Chapter 11 proceedings as a forum for asset sales. The rule adopted by the Eleventh Circuit in this case facilitates abuse by entities who wish to use the Bankruptcy Code to avoid tax liability on asset sales.

Finally, the court of appeals' holding in this case cannot be reconciled with § 1146(c)'s literal meaning and statutory context, misapplies the Second Circuit's seminal decision in *In re Jacoby-Bender, Inc.*, 758 F.2d 840 (2d Cir. 1985), and runs afoul of this Court's repeated admonition that tax exemptions generally, and federal exemptions from state taxes specifically, must be construed narrowly. For all of these reasons, this Court should grant the petition for certiorari and reverse the judgment of the Eleventh Circuit.

I. THE ELEVENTH CIRCUIT'S DECISION ENCOURAGES FORUM SHOPPING.

In its petition, Florida thoroughly discusses the circuit split created by the Eleventh Circuit's decision. If this split is not resolved, it can be expected to encourage forum shopping in those cases where parties anticipate the sale of significant amounts of real estate. Indeed, the risk of forum shopping—present whenever the federal courts are divided, as they are here—is particularly acute in the bankruptcy context. Under the venue provisions of the Bankruptcy Code, a debtor may file its case in any of several districts—the district of its domicile, of its residence, of its principal place of business, or of its principal assets. In addition, a debtor may file in any district in which an affiliate, general partner or partnership files for bankruptcy. See 28 U.S.C. § 1408. Beyond these options, § 1408(2) also allows affiliated entities to file in any jurisdiction where any one of them is in bankruptcy proceedings. This permits a forum shopper to incorporate an affiliate in a jurisdiction where the former ultimately wants to file, put the affiliate in bankruptcy, and then file itself in the hand-picked jurisdiction.

With the decision in this case, a debtor planning to sell real estate has an incentive to file for bankruptcy in the Eleventh Circuit, where it may qualify for the exemption at the very inception of the case, prior even to filing a plan. In the Eleventh Circuit, the pre-plan sale will enjoy the more liberal tax exemption, even if the property involved is located elsewhere in the country. Indeed, that would be so even if the property were located in the Third or Fourth Circuits, where the courts of appeals have refused to extend the § 1146(c) exemption to pre-confirmation sales.

This case presents an ideal vehicle for resolving the circuit and lower court split on this critical question of bankruptcy and tax law, to ensure nationwide uniformity of bankruptcy rules (as the Constitution demands, U.S. Const. art. I, § 8, cl. 4), and to eliminate what is now a powerful incentive to forum shop.

II. THE QUESTION PRESENTED IS OF SIGNIFICANT PRACTICAL IMPORTANCE, AS MORE AND MORE COMPANIES SEEK TO USE CHAPTER 11 TO SELL ASSETS BEFORE PLAN CONFIRMATION.

Recent trends in the use of Chapter 11 make the tax status of pre-confirmation sales of critical and growing importance. While Chapter 11 is the reorganization chapter of the Bankruptcy Code, it increasingly serves as a platform for selling assets in bulk, after which the debtor may seek to confirm a liquidation plan, or the case may be dismissed or converted to a proceeding under Chapter 7. Indeed, "[c]orporate reorganizations have all but disappeared. Giant corporations make headlines when they file for Chapter 11, but they are no longer using it to rescue a firm from imminent failure. Many use Chapter 11 merely to sell their assets and divide up the proceeds." Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 Stan. L. Rev. 751, 751 (2002); see also Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 Stan. L. Rev. 673, 674 (2003) (stating that in 84%

of Chapter 11 cases filed in 2002, the investors had a deal in hand when the case was filed or used the case to sell assets).

Experts have acknowledged this trend and have concluded that:

> if restructuring the business as a going-concern is no longer the primary focus of a chapter 11, then, instead of determining how to restructure and reorganize the business, one must focus on the process by which assets are sold and liquidated through a chapter 11 to maximize their value to creditors. Thus, the primary focus must be on Sections 363 [use, sale and lease of property] and 365 [executory contracts and unexpired leases] of the Bankruptcy Code.

Hon. J. Vincent Aug *et al.*, *The Plan of Reorganization: A Thing of the Past?*, 13 J. Bankr. L. & Prac. 4 Art. 1 (2004).

This case illustrates the trend. Piccadilly negotiated and executed an agreement for the sale of nearly all of its assets to Piccadilly Acquisition Corporation with the understanding that Piccadilly would file for bankruptcy and the sale would take place through a court-approved process. The next day, Piccadilly filed for bankruptcy and sought both authority under § 363 to sell its assets outside the ordinary course of business pursuant to a court-approved auction process, and a declaration that the sale would be tax exempt under § 1146(c). The auction proceeded, and the sale closed in March. Only later did Piccadilly even file its proposed liquidation plan, and it was not until October 2004, seven months later, that the court actually confirmed the plan.

The practice of using Chapter 11 for the bulk sale of assets outside of a confirmed plan has become commonplace. By conducting the asset sale in the context of a bankruptcy, debtors receive the benefit of the automatic stay, and they are able to

sell their assets using a court-approved auction process. Moreover, by selling their assets pursuant to § 363, rather than a confirmed liquidation plan, debtors avoid (or at least forestall) the need to make certain disclosures necessary for the approval of a disclosure statement, to submit the plan to a creditor vote, or to satisfy plan confirmation criteria under § 1129. Indeed, a debtor may obtain court permission to sell assets under § 363 merely by showing that the sale is within the debtor's sound business judgment. See *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2nd Cir. 1983).

The process also allows purchasers to obtain assets free and clear of liens, claims and encumbrances, including successor liability claims, and to obtain other protections without having to await plan confirmation. See 11 U.S.C. § 363(f) and (m); *In re Trans World Airlines, Inc.*, 322 F.3d 283, 293 (3d Cir. 2003).[5] In addition, if the sale order grants the § 1146(c) exemption, both the debtor and the non-debtor purchaser are exempt, even where state or local law imposes the tax on the purchaser rather than the debtor. See *Matter of CCA Partnership*, 70 B.R. 696 (Bankr. Del.), aff'd, 72 B.R. 765 (D. Del.), aff'd, 833 F.2d 303 (3d Cir. 1987) (table).[6]

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[5] A checklist of suggested provisions for use in a judicial sale order, intended to provide the purchaser with the maximum possible protections, appears as an exhibit to *The Plan of Reorganization: A Thing of the Past, supra.* Included is a recommended provision declaring the sale exempt from taxes under § 1146(c).

[6] Guided by the same broad construction of § 1146(c), the Eleventh Circuit has also applied the exemption to non-debtor property, where a lender would not provide financing for the debtor without entering into a deal with the non-debtor, as well. See *In re T.H. Orlando Ltd.*, 391 F.3d 1287, 1289-90, 1295 (11th Cir. 2004).

In short, the trend is to use Chapter 11 to sell assets under § 363. Accordingly, the tax treatment of pre-confirmation sales has become of substantial and growing importance to state and local tax authorities nationwide.

III. THE ELEVENTH CIRCUIT'S DECISION CANNOT BE SQUARED WITH THE PLAIN MEANING OF § 1146(C) OR DECISIONS OF THIS COURT.

Finally, the Eleventh Circuit's decision fails on its merits. The court determined that § 1146(c) is ambiguous and that transfers are made "under a plan confirmed," regardless of when the transfers took place, so long as the transfer is deemed "necessary to the consummation of a confirmed plan." Pet. App. 9a. In its petition, Florida ably explains why the plain meaning analyses of the Third Circuit in *Hechinger* and the Fourth Circuit in *NVR* are better reasoned and should be followed. A few additional points bear mention.

First, the Eleventh Circuit determined that, because other Bankruptcy Code provisions include language specifically limiting their application to certain stages of the bankruptcy process, Congress must not have intended to place any temporal limits on transfers eligible for the § 1146(c) exemption. *Id.* But the court overlooked a critical fact. Section 1146 falls within Subchapter III of Chapter 11 (covering §§ 1141-1146), and that subchapter is entitled "Postconfirmation Matters," a clear indication of Congress' intent to limit the exemption to post-confirmation transfers.

Second, while acknowledging the rule that tax exemptions must be narrowly construed, the Eleventh Circuit nevertheless concluded that a narrow construction here would interfere with § 1146(c)'s objectives and with the remedial goal of the Bankruptcy Code as a whole. Pet. App. 8a. This analysis is flawed. The Eleventh Circuit, and other courts that have found that a narrow construction of § 1146(c) would defeat the

purpose of the exemption, rely on language from the Second Circuit's decision in *Jacoby-Bender*. See *id.* at 6a-7a; see also *In re Beulah Church of God in Jesus Christ, Inc.*, 316 B.R. at 48; *In re Webster Classic Auctions, Inc.*, 318 B.R. 216, 218 (Bankr. M.D. Fla. 2004). But *Jacoby-Bender* involved a property sale pursuant to an already confirmed Chapter 11 plan, which contemplated that the sale would fund payments to creditors. Moreover, the passage in that decision describing § 1146(c)'s "apparent purpose"—"to facilitate reorganizations through giving tax relief," 758 F.2d at 841—is entirely consistent with the Third and Fourth Circuit's more limited, plain language interpretation. Congress could (and did) balance the advantages of a tax break for debtor reorganization with the injury to state and local taxing authorities from the loss of revenue. The balance that § 1146(c) strikes is a sensible one: tax benefits are available, but only after the debtor achieves a confirmed plan, with all of the substantive and procedural protections that the confirmation process ensures for creditors.[7]

Third, in place of a plain reading of § 1146(c), which limits the exemption to post-plan transactions, the Eleventh Circuit's standard lacks any textual support. In an effort to assign some meaning to the statutory phrase "under a plan confirmed," the Eleventh Circuit requires a transfer to be "necessary" or "essential" to plan confirmation to receive the tax exemption. But this is a distinction—between necessary or essential, on the one hand, and unnecessary or nonessential, on the other—without any mooring in the Code. And this rule not only confers a tax benefit in cases where § 1146(c)'s plain language would not (as it did in this case), but it likely withholds benefits from some who would receive it under the

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[7] Sections 1121-1129 of the Bankruptcy Code set out the requirements for proposing a plan, making adequate disclosures, soliciting votes, and ultimately confirming a plan.

statute's literal terms. The statute exempts transfers conducted "under a plan confirmed," regardless of their importance to the plan as a whole, while the Eleventh Circuit would seem to exclude incidental or less important sales, whether they occur before or after confirmation.

Finally, the Eleventh Circuit's liberal construction of the § 1146(c) exemption is difficult to reconcile with prior decisions of this Court, which not only require tax exemptions generally to be narrowly construed, see *United States v. Centennial Savs. Bank FSB*, 499 U.S. 573, 583 (1991), but strictly read federal laws that interfere with a state's tax scheme, specifically. See *Nat'l Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582, 590 (1995). Furthermore, this Court has long held in the bankruptcy context that if Congress intended to exempt a debtor or trustee from applicable state or local taxes, "[t]he intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." *Swartz v. Hammer*, 194 U.S. 441, 442 (1904) (no exemption from state and local property taxes), see also *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 853-54 (1989) (no exemption from sales and use taxes). Nothing on the face of § 1146(c) evinces such a clear, congressional purpose. If Congress intended to extend § 1146(c) to pre-confirmation sales that are essential to a later plan, it would be expected to have said so expressly.

For these reasons, and those set forth in the certiorari petition, the Eleventh Circuit's decision not only deepens a split within the federal courts over an issue of critical importance, but the decision is fundamentally flawed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JOINT APPENDIX

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No. 07-312

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Petitioner,

v.

PICCADILLY CAFETERIAS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 31, 2007
CERTIORARI GRANTED DECEMBER 7, 2007

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State of Florida, Dept. of Revenue
v. Piccadilly Cafeterias, Inc., Case No. 07-312

NOTATION

The following opinions, decisions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Order of the United States Bankruptcy Court for the Southern District of Florida, dated March 8, 2006.....A33

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State of Florida, Dept. of Revenue v. Piccadilly Cafeterias, Inc., Case No. 07-312

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
www.flsb.uscourts.gov

In re:	)	**Chapter 11**
	)	
PICCADILLY CAFETERIAS, INC.,	)	**Case No. 03-27976-BKC-RBR**
	)	
Debtor.	)	

ORDER (A) APPROVING AMENDED COMPETITIVE BIDDING AND SALE PROCEDURES, AND BID PROTECTIONS, (B) APPROVING AMENDED FORM OF ASSET PURCHASE AGREEMENT, (C) APPROVING FORM AND MANNER OF NOTICES, (D) SCHEDULING HEARING DATES TO CONDUCT AUCTION AND TO CONSIDER FINAL APPROVAL OF SALE INCLUDING TREATMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES, AND (E) GRANTING RELATED RELIEF

THIS MATTER coming to be heard on December 2, 2003 at 9:30 a.m. (the "Procedures

Hearing") upon the motion (the "Sale Motion")[1] of Piccadilly Cafeterias, Inc., the debtor in the above captioned chapter 11 case (the "Debtor" or "Seller"), with respect to the proposed sale (the "Sale") of substantially all of the Debtor's assets (the "Seller Assets") to Piccadilly Acquisition Corporation (the "Proposed Buyer") for entry of an order (A) approving competitive bidding and sale procedures (the "Bidding Procedures"), including certain buyer protections to be granted to Proposed Buyer herein (the "Bid Protections"), (B) approving the form of asset purchase agreement (the "Agreement") to be used in connection with the Sale, (C) approving the form and manner of notice of the Sale and treatment of executory contracts and unexpired leases to be assumed and assigned in connection with the Sale (the "Executory Contracts"), (D) scheduling dates to conduct an auction and to set a hearing to consider final approval of the Sale and treatment of the Executory Contracts (the "Sale Hearing"), and (E) granting related relief. At the Procedures Hearing on the Sale Motion, the Debtor advised the Court regarding various modifications to the Bidding Procedures, the Bid Protections and the Agreement to which the Debtor, the Proposed Buyer, the Ad Hoc Committee of Senior Secured Noteholders consisting of the holders (the "Noteholders") of in excess of 2/3 of the outstanding amount of the Debtor's Senior Secured Notes (the "Noteholders Committee"), had agreed. The Court, having reviewed the Sale Motion and having considered the Agreement, the Bidding Procedures, Bid Protections (each as amended hereby or as contemplated hereby, and each reference in this

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[1] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Bidding Procedures (as defined herein).

Order to the Agreement, Bidding Procedures and/or Bid Protections shall be deemed to refer to the same, as amended hereby or contemplated hereby), the objections to the Sale Motion filed by the Noteholders Committee (the "Noteholders Objection"), the Official Committee of Unsecured Creditors (the "Committee" or "Creditors Committee"), and the United States Trustee (the "US Trustee") and the Response and Reservation of Rights of Circus Property I, LLC, Circus Property II, LLC and GE Capital Franchise Corporation, as well as sworn live testimony of (a) Douglas Berman, on behalf of the Proposed Buyer, (b) Jeffrey Bernstein, on behalf of the Proposed Buyer, and (c) Vincent J. Colistra, the Debtor's Chief Restructuring Advisor (and the Court having considered the candor and demeanor of such witnesses), as well as the record before the Court in this case, statements of counsel, including statements regarding the agreements reached among the Debtor, the Noteholders Committee, Wells Fargo Foothill, Inc. ("WFF") and the Proposed Buyer, the Noteholders Objection having been withdrawn based on the agreements set forth herein, and the objections raised and argued to the Court by the Committee and the US Trustee (collectively, the "Objections"); the Court finding that (a) it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (N), and (c) notice of the Sale Motion was sufficient under the circumstances; and the Court being fully advised in the premises and having determined that (i) the objections raised in this matter and not otherwise withdrawn (including the Objections) should be overruled, and (h) the legal and factual bases set forth in the Sale Motion establish just cause for the relief herein granted;

IT IS HEREBY FOUND AND DETERMINED THAT:

A. In support of the, Sale Motion, the Debtor called three witnesses[2]: Douglas Berman, Jeff Bernstein and Vincent J. Colistra. Mr. Berman is a Managing Director of HIG Capital, LLC and its affiliates ("HIG"). HIG and TruFoods Corporation ("TruFoods") formed the Proposed Buyer for the purpose of effectuating the purchase of the Seller Assets in accordance with the Agreement. HIG manages several substantial private equity funds which in the aggregate have approximately $450 million under management and which own portfolio companies with aggregate annual sales of approximately $3.5 billion. HIG routinely bids for and acquires distressed businesses in bankruptcy sales. Over the past three years, HIG has acquired many companies in bankruptcy related sales. MG has been selected as a "stalking horse" bidder in connection with numerous sales conducted pursuant to Section 363 of the Bankruptcy Code, and has fulfilled its obligations as a "stalking horse" bidder in such cases. Mr. Berman testified that to date the Proposed Buyer has incurred substantial out of pocket expenses in connection with its due diligence and proposed acquisition of the Seller Assets. Specifically, Mr. Berman testified that the Proposed Buyer has expended or incurred approximately $150,000 in legal fees, $120,000 in accounting and financial due diligence expenses, and approximately $15,000 in travel related expenses. Mr. Berman also testified that he reasonably projects that the Proposed Buyer

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[2] The Committee called no witnesses and did not seek to introduce any documentary or other evidence in support of its objection to the Sale Motion.

will incur additional expenses aggregating $255,000 relating to legal fees, accounting and financial due diligence fees, and travel costs. In addition to such fees and costs, Mr. Berman testified that the Proposed Buyer will incur approximately $450,000 in loan commitment fees in connection with debt financing for the proposed Sale, some portion of which will be payable by the Proposed Buyer prior to the Auction. Mr. Berman also testified that the Bid Protections were a material inducement for the Proposed Buyer remaining engaged in the sale process and that the Proposed Buyer made substantial concessions - both financial and non-financial- in connection with its efforts to satisfy the concerns and resolve the objections filed to the Sale Motion, and to demonstrate further the good faith of the Proposed Buyer. The Court finds Mr. Berman's testimony to be credible.

B. Mr. Bernstein is the President and CEO of TruFoods. TruFoods is a restaurant franchise and management company. It manages the Arthur Treachers Seafood Restaurants, Wall Street Deli and Pudgies Fried Chicken. Mr. Bernstein testified that TruFoods has paid or incurred, on behalf of the Proposed Buyer, $110,000 in consulting fees in connection with its due diligence, $30,000 in legal fees, and approximately $35,000 in travel related costs. Mr. Bernstein estimated that TruFoods would incur approximately an additional $25,000 per month in due diligence and other expenses on behalf of the Proposed Buyer in connection with the Sale. The Court finds Mr. Bemstein's testimony to be credible.

C. Finally, the Debtor called Mr. Colistra to testify in support of the Sale Motion. Mr. Colistra is a partner of Phoenix Management Services, Inc. ("Phoenix"). Phoenix is a nationally recognized crisis management and financial advisory firm. Since May

2003, Mr. Colistra has served as the Debtor's Chief Restructuring Advisor. Additionally, PMCM, LLC - a Phoenix affiliate – has provided interim management to the, Debtor, including the Debtor's interim CEO John McGregor, who has substantial experience in the restaurant industry. Mr. Colistra testified that in conducting bankruptcy sales of going concern businesses it is extremely beneficial for the debtor to enter the case, with a "stalking horse" purchaser. The existence of a "stalking horse" both sets a floor for the purchase price and gives credibility to the sale process. Mr. Colistra also testified that the Proposed Buyer in this case is especially attractive to the market and beneficial to the sale process because the Proposed Buyer is a joint venture of a strategic restaurant operator and a highly regarded financial partner. Mr. Colistra testified that the negotiation of the Agreement, including the Bidding Procedures and Bid Protections, were conducted in good faith and entirely at arm's length. The modifications to the Bidding Procedures and the Bid Protections that were made immediately before, and at the Procedures Hearing afforded substantial additional benefits to the Debtor, its estate and the Sale process, by, inter alia, extending the Sale process by approximately 30 days, reducing the amount of the Break Up Fee (by eliminating the separate Expense Reimbursement (as defined in the Agreement)), and increasing the amount of both the Proposed Buyer's Earnest Money Deposit and the liquidated damages recoverable from the Proposed Buyer in the event it breaches the Agreement and fails to close on the Sale. Importantly, Mr. Colistra testified that the Bidding Procedures and Bid Protections, as amended, will not "chill" bidding and are within a customary range for transactions of this type. Finally, Mr. Colistra testified that the Debtor had undertaken substantial

efforts to respond to and accommodate the Committee's concerns about and interest in considering an internal restructuring of the Debtor. Indeed, the Order submitted by the Debtor and approved by Phoenix which authorizes the Debtor to retain PMCM for its interim management expressly provides, at the Committee's request, for three individuals selected by the Committee to augment PMCM's staff and assist PMCM in conducting additional analysis of the feasibility and advisability of a stand alone plan of reorganization (and for PMCM to reduce its otherwise approved compensation by 1/3 of the total cost of this additional staff, not to exceed $20,000); provided that this additional review and the Sale process shall both commence upon entry of this Order and proceed at the same time. The Court expressly rejects the inference that the Committee sought to make in its cross-examination of Mr. Colistra regarding his or the Debtor's irrevocable commitment to a Sale. In fact, the Court readily concludes that Mr. Colistra clearly understands his fiduciary duties and obligations to the Debtor's estate and its creditors to maximize the value of the Debtor's assets. The Court finds Mr. Colistra's testimony to be credible.

D. The Debtor has articulated good and sufficient business justification for approving the Bidding Procedures and the Bid Protections. The Bidding Procedures and Bid Protections are reasonable and appropriate and represent the best method for maximizing the value of the Seller Assets.

E. Notice of the Bidding Procedures and Bid Protections approved hereby and the method of notice for the Sale proposed herein and in the Sale Motion are good and sufficient notice of the Bidding Procedures, the Bid Protections, the Auction, the Sale Hearing, the Objection Deadline (as defined herein)

and the proposed Sale and no other or further notice is required.

F. The Bid Protections are a reasonable and material inducement for the Proposed Buyer's offer to purchase the Seller Assets on the terms set forth in the Agreement. The Bid Protections, as amended, are the result of good faith and arm's length negotiations conducted by the Debtor, the Proposed Buyer, the Noteholders Committee, and except for those of the Bid Protections which were litigated, by the Committee as well, and have resulted in the Proposed Buyer making the offer set forth in the Agreement, and are designed to result in improving and bettering that offer pursuant to the amendments to the Agreement contemplated and required hereby. Moreover, in response to various comments and objections made concerning the Sale Motion, the Bidding Procedures and the Bid Protections, the Proposed Buyer, Debtor and Noteholders Committee have negotiated at arm's length and in good faith and have reached various accommodations and compromises that favorably impact the sale process, as set forth herein and on the record of the hearing on the Sale Motion, including but not limited to (a) extension of time to solicit bids, (b) reduction of the total Break-Up Fee by elimination of the Expense Reimbursement (c) compromise and reduction of the Break-Up Fee in the event an Alternative Transaction consists of a "Stand Alone Plan" (as defined below), (d) an increase of the Proposed Buyer's Earnest Money Deposit from $300,000 to $1 million and the further increase of that deposit to $1.62 million as provided in paragraph L below, and (c) provision that such increased deposit amount would be forfeited as liquidated damages in the circumstances described therefor in the Agreement. Finally, absent approval of the Bidding Procedures and the Bid Protections by

December 4, 2003, the Proposed Buyer may terminate the Agreement under its terms without liability, and the Debtor's estate may lose the Proposed Buyer's offer and therefore an opportunity to obtain the highest and best available offer for the Seller Assets.

G. In particular, the payment to the Proposed Buyer of the Break-Up Fee or the alternative Termination Fee (as defined below): (i) is of substantial benefit to the Debtor's estate, (ii) is reasonable and appropriate, considering, among other things, the size and nature of the Seller Assets proposed to be sold and the efforts that have been and will be expended by the Proposed Buyer, notwithstanding that the proposed sale is subject to higher and better offers for the Seller Assets, (iii) was negotiated on an arms-length basis and in good faith, and (iv) is necessary to ensure that Proposed Buyer will continue to be obligated in accordance with the Agreement. The Break-Up Fee and alternative Termination Fee were material inducements for, and condition of, Proposed Buyer's agreement to enter into the Agreement, and to amend it as contemplated and required hereby. The Proposed Buyer is unwilling to commit to hold open its offer to purchase the Seller Assets under the terms of the Agreement unless it is assured payment of the Break-Up Fee or the alternative Termination Fee. Further, because the Break-Up Fee or the alternative Termination Fee induced Proposed Buyer to research the value of the Seller Assets and submit a bid that will serve as a minimum or floor bid on which other bidders can and will rely, the Proposed Buyer has provided a benefit to the Debtor's estate by increasing the likelihood that the price at which the Seller Assets will ultimately be sold will be the highest and best offer and reflect their true worth. Finally, if the Break-Up Fee or Termination Fee is not approved, and Proposed

Buyer, as a result, determines not to pursue the Sale, the Debtor may lose the opportunity to engage in an auction which will foster and generate competitive bidding.

H. The Debtor's commitment to pay the Break-Up Fee or alternative Termination Fee and agreement to implement the Bidding Procedures and Bid Protections, as described herein and in the Agreement, are an integral part of the Debtor's agreement with Proposed Buyer.

I. The Proposed Buyer has increased its deposit to $1,000,000, and has further agreed to increase its deposit by $620,000 to an aggregate amount of $1,620,000 within one business day after Proposed Buyer is selected as the Successful Bidder at the Auction in accordance with the Bidding Procedures, which increased deposit shall be posted with the Debtor before the commencement of the Sale Hearing.

J. The Noteholders Committee initially objected to the Sale Motion. It is significant to the Court that this important constituency actively participated in the process of negotiating the amendments to the Bidding Procedures and the Bid Protections, and ultimately supports the relief sought by the Debtor and has urged the Court to grant such relief.

NOW THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Sale Motion, as amended in the manner set forth herein and as modified on the record, is GRANTED, and all objections thereto not otherwise withdrawn (including the Objections) are OVERRULED.

2. The Sale Hearing shall be held before the undersigned United States Bankruptcy Judge, on **February 13, 2004**, at **9:30 a.m.** Prevailing Eastern Time in the United States Bankruptcy Court for the Southern District of Florida, 299 East Broward Blvd., Courtroom 308, Ft. Lauderdale, Florida 33301, at which time the Court shall consider the Sale Motion and confirm the results of the Auction, if one is conducted. Any objections to the Sale Motion shall be filed with the Court in writing on or before 12:00 p.m. on February 10, 2004, and shall be served, so as to be actually received by 12:00 p.m. Prevailing Eastern Time (the "Objection Deadline"), upon: (i) counsel to the Debtor, Berger Singerman, P.A., 200 S. Biscayne Blvd., Suite 1000, Miami, Florida 33131, Attn: Paul Steven Singerman and Jordi Guso, Facsimile (305) 714-4340 ("Berger"); and (ii) counsel to the Proposed Buyer, White & Case LLP, 200 S. Biscayne Blvd., Suite 4900, Miami, Florida 33131, Attn: John K Cunningham, Facsimile (305) 358-5744, and to WFF, the Committee and the Noteholders Committee in accordance with their respective contact information attached as Schedule A to the Bidding Procedures (collectively, the "Notice Parties"). No later than ten (10) days prior to the Initial Bid Deadline (as defined in the Bidding Procedure), the Debtor shall serve on all counterparties to the Executory Contracts which the Debtor intends to assume and assign to the Proposed Buyer (based on the Proposed Buyer's notice to the Debtor of such Executory Contracts) by first class mail, postage prepaid, a notice of (i) the Debtor's intent to assume and assign that party's Executory Contracts to the Proposed Buyer or any other Successful Bidder, as applicable, and (ii) the cure amount necessary to assume the Executory Contract, if any (the "Cure"). Any objection to the assumption and assignment of the Executory Contracts to the

Proposed Buyer (or other Successful Bidder, as applicable) or Cure shall be filed and served on the Notice Parties by the Objection Deadline, which objection (if any) shall be heard by the Court at the Sale Hearing. If no objection is timely received, the Executory Contracts may be deemed assumed and assigned to the Proposed Buyer or any Successful Bidder, as applicable, in accordance with the Sale Order, and the Cure (as set forth in the Debtor's notice of assumption) shall be controlling, notwithstanding anything to the contrary in any Executory Contract or any other document, and the non-debtor party to the Executory Contract shall be forever barred from asserting any other Cure claims against the Debtor or Proposed Buyer (or the Successful Bidder, as applicable) or the property of any of them. The forgoing notice of assumption and assignment and Cure with respect to the Executory Contracts shall be deemed good and sufficient notice and no other or further notice shall be required. If a party other than the Proposed Buyer is the Successful Bidder at the Auction, all counterparties to executory contracts or unexpired leases which the Debtor intends to assume and assign pursuant to the proposed sale of the Assets shall be served within two business days after the entry of the Sale Order a notice of the winning bid, including sufficient information for the counterparty to evaluate the proposed assignee's ability to comply with section 365 of the Bankruptcy Code (the "Post-Auction Notice"). A counterparty to such an executory contract or unexpired lease who receives a Post Auction Notice may file and serve an objection to such assumption and assignment within ten days after service of the Post Auction Notice based solely on grounds arising under section 365 of the Bankruptcy Code, including, but not limited to, provision of adequate assurance of

future performance. If no objection is timely filed, such assumption and assignment shall be deemed authorized without any further order of this Court. If a timely objection is properly filed and served, a hearing shall be held before the court promptly. The failure of any objecting party to file its objection to the Sale Motion, the Sale or the Debtor's consummation and performance of the Agreement on or before the Objection Deadline shall be a bar to the assertion at the Sale Hearing or thereafter, of any objection to the Sale Motion, the Sale or the Debtor's consummation and performance of the Agreement, if authorized by the Court.

3. The Sale Hearing may be adjourned from time to time without further notice to creditors or parties in interest other than by announcement of the adjournment in open court or on the Court's calendar on the date scheduled for the Sale Hearing or any adjourned date.

4. If the Debtor receives a timely Qualified Bid, the Auction shall be conducted on February 11, 2004 at 10:00 a.m. at the Offices of Berger Singerman, P.A., 350 E. Las Olas Boulevard, Suite 1000, Ft. Lauderdale, Florida 33301. Objections to the Auction shall be filed with the Court in writing on or before 4:00 p.m. Prevailing Eastern Time on February 12, 2004, and shall be served so as to be actually received by 4:00 p.m. Prevailing Eastern Time upon the Notice Parties set forth in paragraph 2 above.

5. Notice of the Sale Motion, the Auction, the Sale Hearing, and the Objection Deadline shall be good and sufficient, and no other or further notice shall be required, if given as follows:

(a) Notice by Mail. As soon as practicable after the entry of this Order, the Debtors shall serve the Sale Motion, the Agreement, and this Order by

first class mail, postage prepaid, on (i) the Notice Parties, (ii) the Office of the US Trustee, (iii) all federal, state and local regulatory or by taxing authorities or recording offices which have a known interest in the relief requested by the Sale Motion, (iv) all non-Debtor parties to the Executory Contracts, (v) the Creditors identified on the Debtor's List of Creditors Holding the Twenty Largest Unsecured Claims, (vi) the United States Attorney's office, (vii) the Securities and Exchange Commission, (viii) the Internal Revenue Service, (ix) the Pension Benefit Guaranty Corporation, (x) the Environmental Protection Agency, (xi) the indenture trustee for the Debtor's notes, (xii) all parties known to the Debtor to have expressed an interest in acquiring the Seller Assets, and (xiii) all other entities that have filed request for notices pursuant to Bankruptcy Rule 2002.

(b) Publication Notice. As soon as practicable after the entry of this Order, the Debtors shall cause a notice, substantially in the form of the Notice of Auction and Sale Hearing attached hereto as Exhibit "1" to be published once in the national edition of the Wall Street Journal.

The Bidding Procedures

6. The Bidding Procedures, as to be set forth in Exhibit 2 hereto and incorporated herein by reference (which shall be prepared consistently with the terms of this Order and the Agreement, as amended hereby, and filed with the Court within 3 days after entry of this Order), are hereby approved and shall govern all proceedings relating to the Sale, the Auction and bids for the Seller Assets, and any subsequent bids for the Seller Assets in this case.

7. Only Qualified Bids submitted by Qualified Bidders by 4:00 p.m. on February 6, 2004 (the "Bid Deadline") will be considered in connection with the Auction. Qualified Bidders are those persons or entities who (i) have executed and delivered to the Debtor a confidentiality agreement (to be provided upon request) in form and substance satisfactory to the Debtor in its sole discretion; (ii) have an executed escrow agreement between potential bidder and Seller that shall be in substantially the form attached as Exhibit 3 hereto (the "Escrow Agreement"); (iii) have completed and executed a bidder information sheet (to be provided upon request) in form and substance satisfactory to the Debtor in its sole discretion, (iv) have delivered to the Debtor the potential bidder's most recent financial statements, or in the case of a potential bidder formed for the purpose of acquiring the Seller Assets, current financial statements of the equity holder(s) of the potential bidder, or such other financial disclosure, acceptable to, and requested by, the Debtor, which information shall demonstrate the financial capability of the potential bidder to purchase the Seller Assets and provide adequate assurance of future performance within the meaning of section 365(f)(2)(B) of the Bankruptcy Code, of any executory contract or unexpired lease to be assumed and assigned to such bidder, should the potential bidder be the Successful Bidder; (v) have delivered evidence that the potential bidder has the necessary internal authorizations necessary to engage in the transaction without the consent of any entity that has not already been obtained or that if any consent is required it can be obtained; and (vi) have delivered a cashier's check made payable to or wire transfer to Berger (the "Qualified Bidder Deposit") in an amount not less than the Break-Up Fee. The Break-Up Fee shall be One Million Six Hundred Twenty Thousand Dollars

($1,620,000) and is inclusive of all expense reimbursement.

8. Any person (other than the Proposed Buyer) that would like to make a competing offer for the Seller Assets or any portion thereof must submit a written bid prior to the Initial Bid Deadline and serve copies of such bid on the Notice Parties. Promptly after the Initial Bid Deadline, counsel to the Debtor shall provide the Proposed Buyer and its counsel with complete copies of all competing offers received.

9. To constitute a Qualified Bid, a bid must satisfy the requirements set forth in the Bidding Procedures, including the following:

(a) The bid must be accompanied by a form of the purchase agreement proposed by the Qualified Bidder that provides for the purchase of all or substantially all of the Seller Assets and the assumption of all or substantially all of the Assumed Liabilities and specifically sets forth those amendments and modifications to the Agreement (the "Marked Agreement"). All modifications or amendments to the Agreement that are contained in the Marked Agreement must be "red lined".

(b) The Marked Agreement must provide for total consideration of no less than $55,820,000 and the assumption of the Assumed Liabilities.

(c) The Marked Agreement must not be conditioned on the ability of the bidder to obtain financing or the outcome of unperformed due diligence by the bidder; provided, that a bid may be subject to the satisfaction of conditions specified in the Marked Agreement in all material respects at the closing of the Sale. Notwithstanding anything herein, the Marked Agreement must provide for the closing of the Sale on a date no later than the date set forth in the Agreement.

(d) The Marked Agreement must be accompanied by a letter affirmatively (i) setting forth the identity of the bidder, the contact information for such bidder, and full disclosure of any affiliates or insiders of the Debtor involved in such bid, (ii) stating that the bidder offers to purchase the Assets upon the terms and conditions set forth in the Marked Agreement, (iii) summarizing the proposed consideration the bidder proposes to pay under the Marked Agreement (e.g., cash and assumed liabilities), (iv) stating the aggregate value of the consideration the bidder proposes to pay under the Marked Agreement (which statement of value shall not be binding on the Debtor or the Bankruptcy Court), (v) stating the form of the Qualified Bidder Deposit (i.e., cashier's check or wire transfer) made by the bidder, and (vi) further providing that such offer shall be binding and irrevocable until 20 days after the entry of the Sale Order.

10. All Qualified Bidder Deposits shall be maintained in the Trust Account of Berger and held by Berger in escrow pursuant to the Escrow Agreement until the earlier of (i) the closing and consummation of the Agreement or Alternative Transaction and (ii) the date the conditions set forth in Section 12 of the Bidding Procedures have been satisfied as to the Qualified Bidder providing such Qualified Bidder Deposit.

11. The Debtor may after consultation with the Noteholders Committee and with their consent (a) determine which Qualified Bid or increased Qualified Bid constitutes the highest and best offer, and which constitutes the second highest and best offer; and (b) reject at any time before entry of an order of the Court approving a Qualified Bid, any bid that, in the discretion of the Debtor, after consultation with and

the consent of the Noteholders, is (i) inadequate or insufficient, (ii) not in conformity with the requirements of the Bankruptcy Code, the Bidding Procedures, or the terms and conditions of the Agreement, or (iii) contrary to the best interests of the Debtor, its estate and/or its creditors.

The Bid Protections

12. The Break-Up Fee in the amount of $1,620,000, as more fully described below and in the Bidding Procedures to be attached hereto, is approved in its entirety and, accordingly, the provisions of the Bidding Procedures and the provisions of the Agreement (including Sections 6.3(b) and 10.2 therein) relating to the Bid Protections, as modified herein are hereby approved and authorized in their entirety. The Break Up Fee shall be paid to the Proposed Buyer only from the Successful Bidder Deposit (except to the extent otherwise expressly provided in this Order) promptly after the first to occur of (a) the closing and consummation of the Alternative Transaction (as defined in the Bidding Procedures), or (b) the termination of the Alternative Transaction in any circumstance under which the Seller (or the Debtor's estate) becomes entitled to retain and does obtain the Successful Bidder Deposit.

13. The Proposed Buyer shall be entitled to the payment of the Break Up Fee from the Debtor's rights, title, claims and interests in and to the Successful Bidder Deposit as set forth herein, including the right to receive the Successful Bidder Deposit if forfeited pursuant to Section 3(b)(vi) of the Bidding Procedures, and in such instance, each of WFF, and the Noteholders Committee have agreed to carve out from and subordinate any claim that its security interests or liens attach to the Successful

Bidder Deposit, but only to the extent and in the circumstance that the Break Up Fee is payable to Proposed Buyer. Further, each of WFF, the Noteholders Committee, the Committee, and other holders of secured and unsecured claims against or interests in the Debtor shall be estopped from contesting the right of the Proposed Buyer to receive payment of the Break Up Fee from the Successful Bidder Deposit and the right to receive the proceeds from such deposit.

14. The termination fee will be staggered. In the event that the Debtor terminates the Agreement before January 4, 2004, other than termination due to Proposed Buyer's material breach or default, in connection with the proposal of a Stand Alone Plan (as defined in paragraph 15 below) or other abandonment of the Sale contemplated by the Agreement (a "Termination Event"), the Debtor shall pay the Proposed Buyer a termination fee in the amount of $350,000.00 (the "Termination Fee"). In the event that the Debtor terminates the Agreement before February 6, 2004, the Debtor shall pay the Proposed Buyer a termination fee in the amount of $550,000.00. The termination fee thereafter shall be $750,000.00. If the Proposed Buyer terminates the Agreement for the breach or default of the Seller or otherwise, no Break Up Fee or Termination Fee shall be due or payable, without prejudice to Proposed Buyer's other remedies (if any). The Termination Fee includes all expense reimbursement. If the Debtor enters into a written agreement for an Alternative Transaction (as defined in the Agreement, but excluding a Stand Alone Plan and a Credit Bid, as both such terms are defined in paragraph 15 below) within 6 months of a Termination Event, then the Proposed Buyer shall be entitled to payment of the Break Up Fee (reduced by the amount of any

Termination Fee previously paid to Proposed Buyer) to be paid from the proceeds received by the Debtor upon consummation of such Alternative Transaction, unless the Debtor is at that time in material compliance with its representations, covenants and warranties under the Agreement (other than those relating to the timing of the Sale and related matters), and the Proposed Buyer is not ready, willing and able to purchase the Assets at the price and under the terms (other than terms relating to the timing of the transaction) of the Agreement. However, if after the occurrence of a Termination Event such subsequent asset sale is conducted following the appointment of a Chapter 11 trustee, or the conversion of the case into a case under Chapter 7 of the Bankruptcy Code, then no Break Up Fee would be due or payable.

15. As used herein, "Stand Alone Plan" shall mean a plan of reorganization, regardless of whether proposed by the Debtor and/or any other parties in interest, under which (i) at least 50% of the equity interests in the reorganized debtor are distributed to (a) holders of the Senior Secured Notes held prior to the entry of this Order, and (b) in the event they receive an equity distribution under such plan of reorganization, all creditors of the Debtor other than the Noteholders that held their claims against the Debtor prior to the entry of this Order (collectively, the "Existing Creditors"), or (ii) no more than 10% of the aggregate equity (which shall include securities convertible into equity) in such internally reorganized debtor is issued or issuable to a party other than an Existing Creditor (excluding any refinancing of WFF's obligations or any usual and customary management option or equity incentive or similar plan). In the event of a credit bid by any or all of the Noteholders at the Auction under section 363(k) of the Bankruptcy

Code (a "Credit Bid"), such Noteholders shall be deemed a Qualified Bidder without having to satisfy the deposit or other requirements therefor, and provided that at least 50% of the outstanding amount of the Senior Secured Notes are then owned by Existing Creditors, purchase of the Seller Assets by means of such Credit Bid will entitle the Proposed Buyer to the Termination Fee but not the Break Up Fee, payable upon consummation of such transaction, and provided, further, that if less than 50% of the outstanding amount of the Senior Secured Notes are then owned by Existing Creditors, the purchase of the Seller Assets by means of such Credit Bid will entitle the Proposed Buyer to the Break Up Fee and not the Termination Fee, payable upon consummation of such transaction.

The Auction

16. At the commencement of the Auction, (a) the Proposed Buyer shall notify Seller of any known breaches of Seller's representations, covenants and warranties under the Agreement of which Proposed Buyer is aware, and (b) each Qualified Bidder shall notify Seller of any known breaches of Seller's representations, covenants and warranties under the Marked Agreement of which such Qualified Bidder is aware. Within one (1) business day after the selection of Proposed Buyer as the Successful Bidder at the Auction in accordance with the Bidding Procedures (and in all events before the commencement of the Sale Hearing), Proposed Buyer shall increase its deposit with Sellers by $620,000 to $1,620,000 in the aggregate. At the commencement of the Auction, the Debtor will identify the opening bid, which will be the Agreement and the Proposed Buyer or another Qualified Bid, which the Debtor shall determine with

the advice and consent of the Noteholders Committee, to be the highest and best Qualified Bid. If no Qualified Bid is received by the Initial Bid Deadline, or if Proposed Buyer is the Successful Bidder, the Debtor shall request at the Sale Hearing that the Court approve the Sale of the Seller Assets to Proposed Buyer.

17. If one or more Qualified Bids have been received by the Initial Bid Deadline, the Debtor shall conduct the Auction. Prior to 4:00 p.m. Prevailing Eastern Time on February 9, 2004, Debtor shall deliver copies of all Qualified Bids (including all documents submitted with each Qualifying Bid) to the Proposed Buyer and each other Qualified Bidder. During the Auction, any Qualified Bidder may increase its Qualified Bid by making another Qualified Bid that:

i. provides for consideration that exceeds by not less than $200,000 the cash consideration to be paid pursuant to the then highest Qualified Bid or Increased Bid, if any (as defined below);

ii. identifies specifically any other changes made to such Qualified Bidder's prior Qualified Bid; and

iii. otherwise satisfies the requirements of this Order, the Agreement, and the Bidding Procedures.

Any bid received from a Qualified Bidder during the Auction that satisfies the requirements set forth in subsections (i) through (iii) above shall constitute an Increased Bid.

18. In the event the bid of the Proposed Buyer is not the opening bid, or in the event of an Increased Bid, the Proposed Buyer and other Qualified Bidders will be entitled to submit successive overbids. The Proposed Buyer shall be entitled, in the calculation of the amount of Proposed Buyer's overbids, to credit bid in the amount of the Break-Up Fee.

19. At the Auction, the Debtor shall review and consider each of the Qualified Bids and the Increased Bids, if any. At the conclusion of the Auction, the Debtor shall determine, with the advice and consent of the Noteholders Committee, which of the Qualified Bids or Increased Bids constitutes the highest and best bid for the Seller Assets, and which of the Qualified Bids or Increased Bids constitutes the second highest and best bid for the Seller Assets; provided, however, that if the competing bids include different economic terms (e.g., alternative forms of consideration as the purchase price or different bundles of Assets or Assumed Liabilities), the Debtor may extend the Auction by one (1) business day, to evaluate such competing bids for the sole purpose of determining and announcing at the conclusion of the Auction the highest and best bid and second highest and best bid (and the Debtor shall not during such time, solicit from any competing bidders additional consideration, terms or conditions), which determination and announcement shall be final, subject to Court approval at the Sale Hearing. The bidder making the bid that is selected as the highest and best bid by the Debtor shall be considered the Successful Bidder and the bidder that is selected as the second highest and best bid by the Debtor shall be considered the Second Highest Bidder, provided that the Proposed Buyer will not be the Second Highest Bidder unless it so elects in writing. The Debtor shall

inform each of the Qualified Bidders (and the Noteholders Committee and the Committee) of the decision regarding who are the Successful Bidder and the Second Highest Bidder.

20. Within twenty (20) business days after the entry by the Bankruptcy Court of the Sale Order, the Qualified Bidder Deposit submitted by all Qualified Bidders shall be returned, except for those submitted by (i) Proposed Buyer (if Proposed Buyer is not the Successful Bidder and does not qualify as and elect to serve as the Second Highest Bidder, in which case the Earnest Money Deposit submitted by Proposed Buyer shall be returned within two (2) business days after the entry of the Sale Order), (ii) the Successful Bidder, in which case the Successful Bidder Deposit will be paid to Proposed Buyer in accordance with paragraph 15 of this Order and as set forth in the Bidding Procedures; and (iii) any bidders (other than Proposed Buyer, as to whom the terms of the Agreement shall govern) that forfeits their Qualified Bidder Deposit pursuant to the Bidding Procedures.

General

21. To the extent the same are not filed with and attached to this Order upon its entry, the Proposed Buyer and the Debtor shall prepare and file with this Court within 3 days after entry of this Order (all in form and content consistent with this Order) (a) an amendment to the Amended and Restated Asset Purchase Agreement, on terms consistent herewith, (b) the Bidding Procedures, and (c) the Escrow Agreement.

22. The Debtor is hereby authorized and empowered to take such steps, expend such sums of

money, and do such other things as may be necessary to implement and effect the terms of this Order.

23. This Order is not intended to and shall not be construed to constitute any findings or rulings in respect of the Sale of the Seller Assets to the Proposed Buyer or any other Qualified Bidder. All objections to such Sale are expressly preserved.

24. The Court shall retain jurisdiction over any matter or dispute arising from or relating to the implementation of this Order.

25. The terms of this Order shall survive any termination of the Agreement. In the event of any conflict or inconsistency between (a) the terms of this Order, and (b) either (i) the record of the Procedures Hearing or (ii) the terms of the Agreement, then in all such cases the terms of this Order shall govern and control.

ORDERED in the Southern District of Florida on December 4, 2003.

RAYMOND B. RAY
UNITED STATES BANKRUPTCY
JUDGE

Copies to:
Jordi Guso, Esq.

(Attorney Guso is directed to mail a conformed copy of this Order upon all interested parties and to file a certificate of service.)

State of Florida, Dept. of Revenue
v. Piccadilly Cafeterias, Inc., Case No. 07-312

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
www.flsb.uscourts.gov

Chapter 11 Case

In re

Case No. 03-27976-BKC-RBR

Piccadilly Cafeterias, Inc.,

Debtor.
_____/

ORDER APPROVING THE SALE OF ASSETS FREE AND CLEAR OFALL LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES AND THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES

THIS MATTER came before the Court on February 13, 2004 at 9:30 a.m. upon the *Debtor's Motion For (I) Approval of Sale of Substantially All Assets Outside The Ordinary Course of Business, Free And Clear Of All Liens, Claims, Encumbrances And Interests; And (II) Authorizing the Assumption And Assignment of Certain Executory Contracts And Unexpired Leases and the Debtor's Amended Motion For (I) Approval Of Sale Of Substantially All Assets Outside The Ordinary Course Of Business, Free And Clear Of All Liens, Claims, Encumbrances And Interest; And (II) Authorizing The Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases* (the "Sale Motion") (C.P. Nos. 21

and 22, respectively) filed by Piccadilly Cafeterias, Inc. (the "Debtor" or "Seller") for entry of an order, pursuant to sections 105(a), 363, 365 and 1146 of title 11 of the United States Code (the "Bankruptcy Code") and Rules 2002, 6004, 5005 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") authorizing and approving: (i) the sale of certain of the Debtors' assets to Piccadilly Investments, LLC, a Delaware limited liability company or its assignee (the "Purchaser") pursuant to the Asset Purchase Agreement dated February 3, 2004 (as may be amended or restated from time to time, the "Purchase Agreement") by and among Seller and the Purchaser, attached to this Order as **Exhibit A**, and (ii) the assumption and assignment of certain executor contracts and unexpired leases of non-residential real property. The Court, having entered the *Amended Order (A) Approving Amended Competitive Bidding and Sale Procedures, and Bid Protections, (B) Approving Amended Form of Asset Purchase Agreement, (C) Approving Form and Manner of Notices, (D) Scheduling Hearing Dates to Conduct Auction and to Consider Final Approval of Sale Including Treatment of Executory Contracts and Unexpired Leases; and (E) Granting Related Relief* (the "Bid Procedures Order") (C.P. No. 208) on December 10, 2003, which approved certain bidding procedures (the "Bid Procedures") with respect to the sale of substantially all of the Debtor's assets (the "Acquired Assets"); an auction (the "Auction") having been conducted on February 11, 2004 in accordance with the Bid Procedures Order, at which Qualified Bids were considered by the Debtor; and as a result of the Auction, the Debtor having concluded that the offer submitted by the Purchaser, as reflected in the Purchase Agreement, among Purchaser and the Seller (as the same may be amended or modified from time

to time, the "Purchase Agreement"),[1] represents the highest and best value for the Acquired Assets; and it appearing, as more particularly discussed below, that due and appropriate notice of the Motion and relief to be granted by this Order has been provided; and all parties in interest having had the opportunity to be heard regarding the Motion and the relief requested; the Court being fully advised in the premises and having considered the Transcript of the 363 Auction Sale, dated February 11, 2004, the evidence adduced at the hearing on the Sale Motion, the arguments of counsel and the proffers (without objection) of testimony of Vincent J. Colistra and Richard D'Abo; and good cause and adequate notice appearing therefor, hereby makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT:

A. Notice

1. This Court entered the Bid Procedures Order on December 10, 2003, which amended the *Order (A) Approving Amended Competitive Bidding and Sale Procedures, and Bid Protections, (B) Approving Amended Form of Asset Purchase Agreement, (C) Approving Form and Manner of Notices, (D) Scheduling Hearing Dates to Conduct Auction and to Consider Final Approval of Sale Including Treatment of Executory Contracts and Unexpired Leases; and (E) Granting Related Relief* (C.P. No. 174) and the Bid Procedures Order has become a final and non-appealable order.

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[1] All capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Purchase Agreement.

2. On November 4 – 6 , 2003 and December 5 – 6, 2003, copies of the Sale Motion and the Bid Procedures Order, respectively, were served by either electronic notice, or, as applicable, first class mail, postage prepaid, upon: (i) all persons that were contacted by the Seller or its advisors in connection with the marketing and sale process for the Assets; (ii) all other prospective purchasers and parties-in-interest who may have sent a written request for information to the Seller; (iii) all entities on the Debtor's Master Service List; (iv) all parties on the Debtor's matrix; (v) all persons known to Debtors that have or may have claims against or interests in the Seller or any of the Assets; (vi) all non-Seller parties to the Executory Contracts and unexpired leases of non-residential real property; (vii) taxing authorities that have jurisdiction over the Debtor and the Acquired Assets; (viii) the United States Attorney's Office and the attorneys general of all states in which the Acquired Assets are located; and (ix) all other Persons entitled to notice pursuant to Bankruptcy Rules 2002, 6004(a), 6004(c), and 6006(c), and as such, a reasonable opportunity to object and be heard has been afforded to all interested parties and entities, as evidenced by the Affidavit of Service filed by Bankruptcy Management Corporation, the Debtor's noticing agent (*See* C.P. Nos. 77 and 205, respectively).

3. On January 27 – 28, 2004, the Bankruptcy Management Corporation served on all non-Seller parties to the Acquired Contracts and Acquired Real Property Leases to be assumed and assigned to the Purchaser pursuant to the Purchase Agreement (collectively, the "Assumed Contracts") a notice (the "Cure Notice") relating to the proposed assumption and assignment of such contracts, which notice set forth, among other things, the amount

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necessary to cure any defaults (the "Cure Amounts") and the date by which objections to the relevant Cure Amounts must be filed and served (*See* C.P. No. 207).

4. Counsel for the Debtor caused the Sale Notice (as defined in the Bid Procedures), in summary form, as required by the Bidding Procedures Order, to be published in The Wall Street Journal (National Edition) on January 9, 2004.

5. Such notices of the Motion (and of the relief requested therein, including, without limitation, approval of the Purchase Agreement with Piccadilly Acquisition Corporation or such other agreement as may constitute a higher or better offer to acquire the Assets), the Bid Procedures Order, the Auction, Bid Procedures, the Cure Amounts and the Sale Hearing that have been provided constitute due, adequate and timely notice in accordance with the requirements of the local rules of this Court, the Bankruptcy Rules, applicable provisions of the Bankruptcy Code (including, without limitation, section 1146(c) thereof) and the United States Constitution.

B. Competing Offers

6. The Purchaser timely submitted a Qualified Bid (as defined in the Bid Procedures). The Auction was held on February 11, 2004 in accordance with the Bid Procedures Order. The Purchase Agreement represents the highest and best offer made for the Acquired Assets, and the Purchaser is the Successful Bidder (as defined in the Bid Procedures).

C. Debtor's Sound Business Judgment

7. The Debtor has determined that the value of the Acquired Assets will be best

preserved and that recoveries for its creditors will be maximized through a prompt going-concern auction, sale process and going-concern sale such as that described in the Sale Motion and reflected in the Bid Procedures Order and the Bid Procedures. The Debtor's business judgment in this regard is reasonable and appropriate under the circumstances. Accordingly, the Debtor has sound business reasons for the sale of the Acquired Assets pursuant to the Purchase Agreement.

8. The Debtor extensively marketed the Acquired Assets and conducted an open and competitive sale process, which was designed by the Debtor to obtain the highest and best offer for the Acquired Assets (the "Competitive Sale Process"). As a result, the Debtor, through the Purchase Agreement, secured not only a fair and reasonable offer, but the highest and best available offer, for the Acquired Assets.

9. The Debtor has sound business reasons for the sale of the Acquired Assets to the Purchaser pursuant to the Purchase Agreement, and the Purchase Agreement and the other relief requested in the Motion should be approved as being in the best interests of creditors of the Debtor and other parties in interest.

D. <u>Good Faith of the Purchaser</u>

10. The Purchaser has proceeded in good faith in all respects in connection with its purchase of the Acquired Assets, as evidenced by (among other things): (a) the Debtor's selection of the Purchaser, through the Competitive Sale Process, to be the purchaser of the Acquired Assets; (b) in connection with the Competitive Sale Process, and the prior orders of this Court, the Debtor was able to, and

did, solicit and receive an offer for the Acquired Assets from an interested party, other than Piccadilly Acquisition Corp., who was identified by the Debtor; (c) the Purchase Agreement and any other related agreements were negotiated at length on an arms-length basis and in good faith; (d) the Purchaser has complied with the provisions of the Bid Procedures Order and has not violated 11 U.S.C. §363(n); (e) all payments and other arrangements by which the Purchaser is purchasing the Acquired Assets are disclosed in the Purchase Agreement; and (f) the Purchaser has no financial or pecuniary interest in the Debtor.

11. The Purchaser is purchasing the Acquired Assets in good faith, and is entitled to the benefits and protections of section 363(m) of the Bankruptcy Code.

E. Additional Items

12. The Debtor has the full power and authority to execute and deliver the Purchase Agreement, the exhibits thereto (as may be amended from time to time) and all other documents contemplated thereby (including, without limitation, any ancillary agreements related thereto (the "Ancillary Agreements")), and to consummate the transactions contemplated by the Purchase Agreement. The Purchase Agreement and all of the transactions contemplated hereby have been duly and validly authorized by all necessary action of the Seller. No consents or approvals, other than the consent and approval of this Court and those expressly provided for in the Purchase Agreement, are required for the Seller to consummate the Sale (as defined below).

13. Except for the Assumed Liabilities, the Purchaser is not assuming any of the debts, liabilities or obligations of the Seller. The Debtor and Purchaser do not have any common controlling shareholders or senior management. The Purchase Agreement is being entered into in good faith and not to hinder, delay or defraud any creditors of the Debtor. Except as expressly set forth in the Purchase Agreement, the Debtor shall not in any way be liable or responsible for any liabilities, commitments, or obligations in any way related to the Acquired Assets or the Assumed Contracts arising from and after the Closing Date.

14. Purchaser has demonstrated adequate assurance of future performance (as required by 11 U.S.C. § 365) with respect to the Assumed Contracts.

15. The consideration provided by the Purchaser pursuant to the Purchase Agreement: (i) is fair and reasonable; (ii) is the highest and best offer for the Acquired Asserts; and (iii) constitutes reasonably equivalent value and fair consideration under the Bankruptcy Code and under the laws of the United States, any state, territory, possession or the District of Columbia.

II. CONCLUSIONS OF LAW

The Court hereby enters the following Conclusions of Law:

A. Jurisdiction And Statutory Predicates

16. The Court has jurisdiction to hear and determine the Sale Motion and to grant the relief requested in the Sale Motion pursuant to 28 U.S.C. §§157(b)(1) and 1334(b). Venue of this case and the

Sale Motion in this district is proper under 28 U.S.C. §§1408 and 1409.

17. This proceeding is a "core proceeding" within the meaning of 28 U.S.C. §157(b)(2)(A), (N) and (O).

18. The statutory predicates for the Motion are sections 105, 363, 365 and 1146(c) of the Bankruptcy Code and Bankruptcy Rules 2002, 6004 and 6006.

B. Section 363 Sale

19. It is a requirement of the Purchase Agreement that the sale of the Acquired Assets be free and clear of all Liens, claims, interests and encumbrances, and that the Purchaser not be subject to, or otherwise liable for, any debts or obligations of any of the Seller except for the Assumed Liabilities and Permitted Liens (such remaining Permitted Encumbrances, the "Surviving Encumbrances").

20. Those holders of Liens, claims, interests and Encumbrances and non-Seller parties to Assumed Contracts that did not object, or which withdrew their objections to entry of this Order, are deemed to have consented to the sale of the Acquired Assets free and clear of such Liens, claims, interests and encumbrances pursuant to section 363(f)(2) of the Bankruptcy Code. Those holders of Liens, claims, interests and encumbrances or non-Seller parties to Assumed Contracts that did object fall within one or more of the other subsections of section 363(f) of the Bankruptcy Code and are adequately protected by having their Liens, claims, interests and encumbrances, if and to the extent valid and enforceable, attach to the proceeds of the sale of the Acquired Assets.

21. The requirements for a sale free and clear of all Liens, claims, interests and encumbrances pursuant to section 363(f) of the Bankruptcy Code have been satisfied.

22. Effective on Closing, the Acquired Assets will be transferred, conveyed and assigned by the Seller to the Purchaser, and, pursuant to the terms of this Order and the Purchase Agreement, title to all such Acquired Assets shall vest entirely in the Purchaser. The Debtor shall not in any way be liable or responsible for any liabilities, commitments, or obligations in any way related to the Acquired Assets or the Assumed Contracts arising from and after the Closing Date.

C. No Successor Liability

23. The Purchaser is not merely a continuation of the Debtor or its estate. There is no continuity of enterprise between the Debtor and the Purchaser.

24. The Purchaser is not a successor to the Seller or its estate, and the transactions contemplated by the Purchase Agreement do not amount to, or otherwise constitute, a consolidation, merger or de facto merger of Purchaser and the Debtor or its estate.

Based on the foregoing Findings of Fact and Conclusions of Law, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED, EFFECTIVE IMMEDIATELY, AS FOLLOWS:**

A. The findings of fact set forth above and the conclusions of law stated herein shall constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any finding of fact shall be

determined to be a conclusion of law, it shall be so deemed, and to the extent any conclusion of law shall be determined to be a finding of fact, it shall be so deemed.

B. The Sale Motion is granted, the Purchase Agreement and the sale of the Acquired Assets to Purchaser pursuant thereto (the "Sale") are approved and the relief requested in the Sale Motion is granted and approved in all other respects (other than with respect to matters previously addressed by the Bid Procedures Order).

C. Objections, if any, to the entry of this Order or the relief granted herein and requested in the Motion that have not been withdrawn, waived or settled, and all reservations of rights included therein, are DENIED and OVERRULED on the merits with prejudice.

D. The Purchase Agreement and the Ancillary Agreements, including, without limitation, the execution, delivery and performance thereof by the Debtor, are hereby authorized and approved in all respects.

E. Pursuant to section 363(b) and 363(f) of the Bankruptcy Code, the Debtor, by any of its officers, and without need for further action by its boards of directors, its shareholders or the Court, are directed, authorized and empowered to take any and all actions necessary or appropriate to consummate the transactions contemplated by the Purchase Agreement (including, without limitation, to convey to the Purchaser the Acquired Assets and the Executory Contracts) in accordance with (and subject to the applicable closing conditions set forth in) the purchase Agreement and this Order and otherwise to perform their obligations under the Purchase Agreement.

F. Pursuant to section 105(a) and 363 of the Bankruptcy Code, the Acquired Assets are,

subject to the terms of the Purchase Agreement, hereby transferred, sold and delivered to the Purchaser free and clear of all Liens, claims, interests and encumbrances (including, without limitation, all Retained Liabilities) of any Person or entity that encumber or relate to or purport to encumber or relate to the Acquired Assets, or otherwise constitute a claim against the Seller, other than Surviving Encumbrances and the Assumed Liabilities. Except as expressly permitted by the Purchase Agreement, all persons and entities, including, but not limited to, all debt security holders, equity security holders, governmental, tax and regulatory authorities, lenders, trade and other creditors, holding Liens, claims, interests or encumbrances of any kind or nature whatsoever against the Seller of the Acquired Assets (whether legal or equitable, secured or unsecured, matured or unmatured, contingent or non-contingent, liquidated or unliquidated, senior or subordinated), arising under or out of, in connection with, or in any way relating to, the Seller, the Acquired Assets, the operation of the Debtor's business prior to the Closing Date or the transfer of the Acquired Assets to the Purchaser, shall be and hereby are forever barred, estopped and permanently enjoined from asserting, prosecuting or otherwise pursuing against the Purchaser, its property, its successors and assigns, its affiliates, or the Acquired Assets, such persons' or entities' claims relating to such Liens, claims, interests or encumbrances (with the exception of Assumed Liabilities and Surviving Encumbrances). Following the Closing Date, no holder of a Lien, claim, interest or encumbrance in or against the Seller or the Acquired Assets (with the exception of Assumed Liabilities or Surviving Encumbrances) shall interfere with the Purchaser's title to or use and enjoyment of the Acquired Assets based on or related to such lien,

claim, interest or Encumbrance, and such lien, claim, interest or Encumbrance, if any, shall be, and hereby is channeled, transferred and attached solely and exclusively to the proceeds of the sale of the Acquired Assets. The Debtor shall not in any way be liable or responsible for, any liabilities, commitments, or obligations in any way related to the Acquired Assets or the Assumed Contracts arising from and after the Closing Date.

G. The transfer of the Acquired Assets to the Purchaser pursuant to the Purchase Agreement shall not result in (i) the Purchaser having any liability or responsibility for any claim (other than for Surviving Encumbrances or Assumed Liabilities) against the Debtor or against an insider of the Debtor, (ii) the Purchaser having any liability or responsibility to the Debtor except pursuant to the Purchase Agreement, the Ancillary Agreements and this Order or (iii) the Debtor having any liability or responsibility to the Purchaser except pursuant to the Purchase Agreement, the Ancillary Agreements and this Order.

H. The Purchaser is not: (i) a successor to any of the Debtor or its estate by reason of any theory of law or equity; or (ii), except with respect to the Assumed Liabilities and Surviving Encumbrances, liable or in any way be obligated or responsible for any claims against or any Indebtedness, liabilities or other obligations of the Seller or its estate (including, without limitation, the Retained Liabilities). Without limiting the generality of the foregoing from and after the Closing, in no event shall the Purchaser have any liability, obligation or responsibility with respect to any liability or obligations of the Debtors to any taxing authorities. Effective on the Closing, except for the Assumed Liabilities, all Persons and entities shall be

permanently and forever barred, restrained and enjoined from commencing or continuing in any manner any action or other proceeding of any kind against the Purchaser as alleged successor to the Debtor or otherwise to assert that Purchaser has any liability or responsibility with respect to any Indebtedness, liability or obligation of the Debtor or its estates (including, without limitation, the Retained Liabilities).

I. This Order: (i) is and shall be effective as a determination that upon Closing, title to the Acquired Assets shall be vested in the Purchaser and that all Liens, claims, interests and encumbrances existing as to the Acquired Assets have been and hereby are adjusted and declared to be unconditionally released, discharged and terminated as a lien, claim, interest of Encumbrance in, to or upon any such Acquired Assets, except for the Assumed Liabilities and Surviving Encumbrances; and (ii) shall be binding upon and govern the acts of all Persons and entities, including, all filing officers, recorders of mortgages and deeds, and other state, federal and local officials. Effective as of the Closing Date, all such Liens, claims, interests and encumbrances of record (except for Assumed Liabilities and Surviving Encumbrances) shall be forthwith removed and deemed stricken as against the Acquired Assets. Notwithstanding the foregoing, if any Person or entity fails to timely deliver to the Seller prior to the Closing, termination statements, releases of Liens or other documents necessary for the release of such Liens, claims, interests and encumbrances with respect to the Acquired Assets, the Debtors and/or the Purchaser are/is hereby authorized to execute and file such documents on behalf of such Person or entity.

J. All Persons who hold Liens, claims, interests or encumbrances (other than Assumed Liabilities and Surviving Encumbrances) in or against the Seller or Acquired Asset are forever barred, estopped and permanently enjoined from asserting or prosecuting the claims or causes of action against Purchaser, its affiliates, or any of its respective officers, directors, employees, attorneys or advisors, or the Acquired Subsidiaries, arising out of or in connection with the Sale.

K. After the Closing Date, no person or entity, including, without limitation, any federal, state or local taxing authority, may (a) attach or perfect a lien or security interest against any of the Acquired Assets on account of, or (b) collect or attempt to collect from the Purchaser of any of its affiliates, any tax (or other amount alleged to be owing by the Seller) (i) for any period commencing and concluding prior to or on the Closing Date, or (ii) assessed prior to and payable after the Closing Date, except as otherwise specifically provided in the Purchase Agreement.

L. On the Closing Date, this Order shall be construed and shall constitute for any and all purposes a full and complete general assignment, conveyance and transfer of the Acquired Assets or bill of sale transferring good and marketable title in the Acquired Assets to the Purchaser. Each and every federal, state, and local governmental agency or department is hereby directed to accept any and all documents and instruments necessary and appropriate to consummate the transactions contemplated by the Purchase Agreement.

M. All entities who are presently, or on the Closing Date may be, in possession of some or all of the Acquired Assets hereby are directed to surrender possession of the Acquired Assets either to

(i) the Seller prior to the Closing Date, for subsequent transfer to the Purchaser on the Closing Date or (ii) to the Purchaser on the Closing Date.

N. The requirements of section 365 of the Bankruptcy Code, including section 365(b)(1) and 365(f)(2) of the Bankruptcy Code, are hereby deemed satisfied with respect to the Assumed Contracts. The Debtor is hereby authorized and directed, in accordance with sections 105(a), 363 and 365 of the Bankruptcy Code, to: (i) assume and assign and transfer to the Purchaser the Assumed Contracts free and clear of all Liens, claims, interests and encumbrances, except for Assumed Liabilities and Surviving Encumbrances; and (ii) execute and deliver to the Purchaser such assignment documents as may be necessary to confirm such assignment and transfer. In accordance with the Cure Notice, the Seller either has (or, by the Closing Date, will have) cured of any default or breaches required to be cured under any of the Assumed Contracts, within the meaning of section 365(b)(1)(A) and (B) of the Bankruptcy Code. The Purchaser has provided adequate assurance of its future performance of and under the Assumed Contracts, within the meaning of section 365(b)(1)(C) of the Bankruptcy Code. The only adequate assurances of its future performance of and under the Assumed Contracts required by the Purchaser shall be the Purchaser's promise to perform in accordance with the Assumed Contracts with respect to obligations first arising or incurred following the Closing.

O. The Assumed Contracts shall be transferred and assigned to, and following the Closing remain valid and binding and in full force and effect for the benefit of, the Purchaser in accordance with their respective terms, notwithstanding any provision in any such Assumed Contract (including those of the

type described in section 365(b)(2), (e)(1) and (f)(1) of the Bankruptcy Code) that prohibits, restricts, or conditions such assignment or transfer and, pursuant to section 365(k) of the Bankruptcy Code, the Debtors shall be relieved from any further liability with respect to the Assumed Contracts after such assignment to and assumptions by the Purchaser. Any provisions in any Assumed Contract that prohibit or condition the assignment of such Assumed Contract or allow the party to such Assumed Contract to terminate, recapture, impose any penalty, condition renewal or extension, or modify any term or condition upon the assignment of such Assumed Contract constitute unenforceable anti-assignment provisions which are void and of no force and effect. All other requirements and conditions under section 363 and 365 of the Bankruptcy Code for the assumption by the Seller and assignment to the Purchaser of each Assumed Contract have been satisfied and, upon Closing, the Purchaser shall be fully and irrevocably vested in all right, title and interest of each Assumed Contract.

P. Upon Assignment of the Assumed Contracts to the Purchaser, no default shall exist under any Assumed Contracts and no non-Debtor party to any Assumed Contract shall be permitted to declare a default by the Purchaser under such Assumed Contract or otherwise take action against the Purchaser as a result of any Debtor's financial condition, bankruptcy or failure to perform any of its obligations under the Assumed Contract, including any failure to pay any amounts necessary to cure any defaults thereunder or any action which occurs prior to the closing. Upon entry of this Order and assumption and assignment of the Assumed Contracts, the Purchaser shall be deemed in

compliance with all terms and provisions of the Assumed Contracts.

Q. The Purchaser shall have no liability or obligation with respect to any default or obligation arising or accruing under any Assumed Contract, except to the extent expressly provided in the Purchase Agreement.

R. The Court hereby determines that the Cure Amounts set forth on the attached **Exhibits B and C** constitute all of the cure amounts that are required to be paid or reserved by the Debtor in order to assume and assign the Assumed Contracts. Those Assumed Contracts set forth in Exhibit C are subject of dispute solely with respect to the respective Cure Amounts and the Debtor and non-debtor parties to said Assumed Contracts shall in good faith make an effort to resolve the disputes regarding the Cure Amounts on or before March 4, 2004. If the Debtor and a non-debtor party to the Assumed Contract set forth in Exhibit C are not able to agree upon the Cure Amount on or before March 4, 2004, the Debtor shall file a certificate of contested matter and the Court shall set an evidentiary hearing to determine the Cure Amount. The Purchaser shall not be required to pay any Cure Amounts relating to the Assumed Contracts and the Seller shall not be required to pay Cure Amounts relating to the Assumed Contracts other than the Seller Cure Amounts. Except for the right to payment of the Cure Amounts, pursuant to sections 105(a), 363 and 365 of the Bankruptcy Code, all parties to the Assumed Contracts are forever barred and enjoined from raising or asserting against the Debtor and/or the Purchaser, any assignment fee, default, breach or claim or pecuniary loss, or condition to assignment, arising under or related to the Assumed Contracts existing as of the Closing or arising by reason of the Closing. Any party that may

have had the right to consent to the assignment of its Assumed Contract is deemed to have consented to such assignment for purpose of section 365(e)(2)(A)(ii) of the Bankruptcy Code and otherwise if it failed to object to the assumption and assignment.

S. The transactions contemplated by the Purchase Agreement are undertaken by the Purchaser in good faith, as that term is used in section 363(m) of the Bankruptcy Code and, accordingly, the reversal or modification on appeal of the authorization provided herein to consummate the Sale shall not affect the validity of the Sale to the Purchaser, unless such authorization is duly stayed pending such appeal. The Purchaser is a good-faith purchaser of the Acquired Assets, and is entitled to all of the benefits and protections afforded by section 363(k) and 363(n) of the Bankruptcy Code.

T. The consideration provided by the Purchaser for the Acquired Assets under the Purchase Agreement is fair and reasonable and may not be avoided under section 363(n) of the Bankruptcy Code.

U. Any amounts that become payable by the Seller pursuant to the Purchase Agreement or any of the documents delivered by the Seller pursuant to or in connection with the Purchase Agreement (i) shall constitute allowed administrative expenses of the Seller's estate pursuant to sections 503(b) and 507 of the Bankruptcy Code and (ii) shall be paid by the Seller in the time and manner as provided in the Purchase Agreement, without further order of this Court and without the necessity of the filings by the Purchaser of proofs of claim on account of such amounts due.

V. Any appeal seeking to enjoin or stay consummation of the Purchase Agreement (an "Appeal") shall be subject to the appellant depositing with the Court or posting a bond in an amount equal

to the aggregate Purchase Price, plus applicable damages, pending the outcome of the Appeal.

W. The provisions of this Order and any actions taken pursuant hereto shall survive the entry of an order which may be entered confirming any plan of reorganization or liquidation for the Debtor, converting the Debtor's case from chapter 11 to a case under chapter 7 of the Bankruptcy Code or dismissing the Debtor's case, and nothing contained in any such order shall alter, conflict with, or derogate from, the provisions of the Purchase Agreement or this Order.

X. The Court shall retain jurisdiction to enforce the provisions of this Order and the Purchase Agreement.

Y. No bulk sales law or any similar law of any state or other jurisdiction shall apply in any way to the sale of the Acquired Assets.

Z. The Purchase Agreement, the Ancillary Agreements and any related agreements, documents or other instruments may be modified, amended or supplemented by the parties thereto, in a writing signed by such parties, and in accordance with the terms thereof, without further order of the Court.

AA. The sale of the Acquired Assets are in contemplation of a plan and, accordingly, the transfer of the Acquired Assets to the Purchaser are exempt, under section 1146(c) of the Bankruptcy Code, from any transfer, stamp or similar tax.

BB. This Order and the Purchase Agreement approved shall be binding in all respects upon all Persons and entities, including, but not limited to, the Debtor and its creditors (whether known or unknown), employees, and shareholders, the non-Seller parties to the Assumed Contracts, governmental authorities, and each of their respective successors or assigns.

CC. Notwithstanding the provisions of Bankruptcy Rules 6004(g) and 6006(d), this Order shall be effective immediately upon entry, and no automatic stay of execution applies with respect to this Order. This Order is a final order for purposes of 28 U.S.C. § 158. The Seller and the Purchaser intend to achieve the Closing as soon as practicable in accordance with the terms of the Purchase Agreement. Therefore, any party objecting to this Order must exercise due diligence in filing an appeal and pursuing a stay, or risk its appeal being foreclosed as moot.

DD. The failure to include specifically any particular provision of the Purchase Agreement in this Order shall not diminish or impair the effectiveness of such provisions, it being the intent of the Court that the Purchase Agreement be authorized and approved in its entirety. Likewise, all of the provisions of this Order are nonseverable and mutually dependent.

EE. Notwithstanding any future order of this Court, this Court shall retain jurisdiction over this Order, the implementation of the Purchase Agreement and all aspects of the sale.

ORDERED in the Southern District of Florida on February 13, 2004 .

_____

HONORABLE RAYMOND B. RAY
UNITED STATES BANKRUPTCY JUDGE

Copies to:
Jordi Guso, Esq.
(Attorney Guso is directed to mail a conformed copy of this Order upon all interested parties and to file a certificate of Service).

Request for Payment of Department of Revenue Taxes

(Bankruptcy Code Cases – Administrative Claims)
DEPARTMENT OF REVENUE/STATE OF FLORIDA

BAN04
R. 11/94

United States District Court for the Southern/Miami

District of Florida

Piccadilly Cafeterias, Inc
3232 Sherwood Forest Blvd.
Baton Rouge, LA 70816-000

Bankruptcy No. 03-27976-BKC-RBR
Type of Bankruptcy Proceeding CH. 11
Date of Petition 10/29/03
Tax Number
Social Security Number
Employer Identification Number 72-0604977

1. The undersigned, whose business address is Post Office Box 6668, Tallahassee, Florida 32314-6668, is the agent of the Department of Revenue, and is authorized to make this claim on behalf of the State of Florida.
2. Request is made for payment of taxes and any interest or penalty due to the Department of Revenue, State of Florida, as shown below.
3. The grounds for the liability is for taxes, interest and penalty due under the Revenue Laws of the State of Florida.

ADMINISTRATIVE CLAIMS – CODE s. 503

Kind of Tax	Tax Due	Accrued Interest To Date	Accrued Penalty To Date	Balance Due
Documentary Stamp	$2,000,000.00			$2,000,000.00

Total amount due as of date of the request..... $ 2,000,000.00

Dollar amount per day at which interest will accrue after this request:..... $ _____

Returned Item Check Fee..... $ _____

Claimant reserves the right to amend if claim is based on estimated amounts of tax due or is otherwise subject to more accurate determination.

Penalty for Presenting Fraudulent Claim Fine of not more than $5,000 or imprisonment for not more than 5 years or both. Title 18 U.S.C., Sec 152	Signature Dahlia Paul	Date May 12, 2004
	Title Senior Attorney	Phone 954-967-1080

Department of Revenue
Office of the General Counsel
6565 Taft St. 4th Floor
Hollywood, Fl 33024-4000

See Attached Summary Sheet

DR 933
R. 11/94

FLORIDA DEPARTMENT OF REVENUE
LEGAL CLAIMS SUMMARY SHEET
Administrative Claims

☒ New Case ☐

☐ Prior Case Out of State Case Code

Taxpayer's Name: Piccadilly Cafeterias, Inc	Location of Court: Southern/Miami Florida
Business Name:	Bankruptcy Case Number: 03-29796-BKC-RBR
Address: 3232 Sherwood Forest Blvd.	Chapter Number: 11 / Petition Date: 10/29/03
City: Baton Rouge / State: LA	Zip Code: 70816-0000 / Account Number:
Tax Type: Documentary Stamp Tax	Date Business Close/Date Converted:

Period Due	Tax Amount	Tax Type	Tax Account	R-fee/Court Fees	Penalty	Interest	Returned Check Control Number
03/16	$2,000,000.00	Estimate					

TOTALS: TAX: $ 2,000,000.00 | PENALTY: $ | INTEREST: $

☐ ☐ Amended Claims:
Supersedes Claim for $
Dated:
Adj. $

Court Costs/Sheriff's Fee $
Returned Check Fee $
Total of Claim $ 2,000,000.00

☐ ☐ Unsecured Priority Claim | ☐ ☒ Secured Claim | ☐ ☐ Debt/Tax Lien Fixed

Trustee Name	Attorney Name: Paul Steven Singerman
Trustee Address	Attorney Address: 200 S. Biscayne Blvd. #1000
City, State, Zip	City, State, Zip: Miami, FL 33131

Date Prepared:	Prepared By:	P & I Figured to:
05/12/04	Dahlia Paul	NA

State of Florida, Dept. of Revenue
v. Piccadilly Cafeterias, Inc., Case No. 07-312

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
www.flsb.uscourts.gov

In re: **Chapter 11**

PICCADILLY CAFETERIAS, INC., now know as CAPITAL CITY CORNICHON CORP., **Case No. 03-27976-BKC-RBR**

Debtor.
_____/

AMENDED JOINT DISCLOSURE STATEMENT BY DEBTOR, PICCADILLY CAFETERIAS, INC., NOW KNOWN AS CAPITAL CITY CORNICHON CORP., AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN SUPPORT OF AMENDED PLAN OF LIQUIDATION

July 16, 2004

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EXHIBITS

EXHIBIT A: Amended Joint Plan of Liquidation by Piccadilly Cafeterias, Inc., now known as Capital City Cornichon Corp., and the Official Committee of unsecured Creditors

EXHIBIT B: Summary of Prepetition Claims

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AMENDED DISCLOSURE STATEMENT FOR THE AMENDED JOINT CHAPTER 11 PLAN OF LIQUIDATION BY PICCADILLY CAFETERIAS, INC. AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

I. INTRODUCTION

Piccadilly Cafeterias, Inc., now known as Capital City Cornichon Corp. (the "Debtor") and the Official Committee of Unsecured Creditors of Piccadilly Cafeterias, Inc. (the "Creditors' Committee") (collectively, the "Proponents") provide this Amended Disclosure Statement (the "Disclosure Statement") to all of the Debtor's creditors and stockholders to assist them in making an informed decision when voting to accept or reject the Amended Joint Chapter 11 Plan of liquidation Proposed By Piccadilly Cafeterias, Inc., now known as Capital City Cornichon Corp., and the Official Committee of Unsecured Creditors (the "Plan") dated July 16, 2004 with the United States Bankruptcy Court for the Southern District of Florida (the "Bankruptcy Court") in connection with the above-captioned case (the "Chapter 11 Case"). A copy of the Plan is attached to this Disclosure Statement as Exhibit "A". Capitalized terms used herein but not otherwise defined have the meanings assigned to such terms in the Plan. Whenever the words "include," "includes" or "including" are used in the Disclosure Statement, they are deemed to be followed by the words "without limitation."

This Disclosure Statement is presented to certain holders of Claims against or Interests in the Debtor in accordance with the requirements of section 1125 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 (the "Bankruptcy Code"). Section 1125 of the Bankruptcy Code requires that a disclosure statement provide information sufficient to enable a hypothetical and reasonable investor, typical of the debtor's creditors and stockholders, to make an informed judgment whether to accept or reject a plan. This Disclosure Statement may not be relied upon for any purpose other than that described above.

THIS DISCLOSURE STATEMENT AND THE PLAN ARE AN INTEGRAL PACKAGE, AND THEY MUST BE CONSIDERED TODETHER FOR THE READER TO BE ADEQUATELY INFORMED. THIS INTRODUCTION IS QUALIFIED IN ITS ENTIRETY BY THE REMAINING PORTIONS OF THIS DISCLOSURE STATEMENT, AND THIS DISCLOSURE STATEMENT IN TURN IS QUALIFIED, IN ITS ENTIRETY, BY THE PLAN. ANY TERMS NOT DEFINED IN THIS DISCLOSURE STATEMENT ARE DEFINED IN THE PLAN.

NO REPRESENTATIONS CONCERNING THE DEBTOR (PARTICULARLY AS TO THE VALUE OF ITS PROPERTY) ARE AUTHORIZED OTHER THAN AS SET FORTH IN THIS DISCLOSURE STATEMENT AND ITS EXHIBITS. ANY REPRESENTATIONS OR INDUCEMENTS MADE TO SECURE YOUR ACCEPTANCE OR REJECTION OF THE PLAN OTHER THAN AS

CONTAINED IN THIS DISCLOSURE STATEMENT AND ITS EXHIBITS SHOULD NOT BE RELIED UPON BY YOU IN ARRIVING AT YOUR DECISION, AND SUCH ADDITIONAL REPRESENTATIONS AND INDUCEMENTS SHOULD BE REPORTED TO COUNSEL FOR THE PROPONENTS, WHO WILL IN TURN DELIVER SUCH INFORMATION TO THE BANKRUPTCY COURT FOR SUCH ACTION AS MAY BE APPROPRIATE.

THE INFORMATION CONTAINED IN THIS DISCLOSURE STATEMENT, INCLUDING ANY EXHIBITS CONCERNING THE FINANCIAL CONDITION OF THE DEBTOR AND THE OTHER INFORMATION CONTAINED HEREIN, OR IN THE EXHIBITS, HAS NOT BEEN SUBJECT TO AN AUDIT OR INDEPENDENT REVIEW EXCEPT AS EXPRESSLY SET FORTH HEREIN.

THIS DISCLOSURE STATEMENT CONTAINS ONLY A SUMMARY OF THE PLAN. EACH CREDITOR AND STOCKHOLDER IS STRONGLY URGED TO REVIEW THE PLAN BEFORE CASTING A BALLOT.

THE STATEMENTS CONTAINED IN THIS DISCLOSURE STATEMENT ARE MADE AS OF THE DATE OF THIS DISCLOSURE STATEMENT UNLESS ANOTHER TIME IS SPECIFIED. THERE IS NO GUARANTY THAT FACTS WILL NOT CHANGE AFTER THIS DISCLOSURE STATEMENT IS FILED; AND IT MUST BE ASSUMED THAT SOME FACTS WILL INDEED CHANGE FROM THAT TIME UNTIL THE HEARING ON THE

APPROVAL OF THE DISCLOSURE STATEMENT OR THE CONFIRMATION OF THE PLAN (DISCUSSED BELOW).

A STATEMENT OF THE ASSETS AND LIABILITIES OF THE DEBTOR AS OF THE DATE OF THE COMMENCEMENT OF ITS CHAPTER 11 CASE IS ON FILE WITH THE CLERK OF THE BANKRUPTCY COURT AND MAY BE INSPECTED BY INTERESTED PARTIES DURING REGULAR BUSINESS HOURS.

THIS DISCLOSURE STATEMENT HAS BEEN PREPARED IN ACCORDANCE WITH SECTION 1125 OF THE BANKRUPTCY CODE AND NOT IN ACCORDANCE WITH FEDERAL OR STATE SECURITIES LAWS OR OTHER APPLICABLE NON-BANKRUPTCY LAW. ENTITIES HOLDING OR TRADING IN OR OTHERWISE PURCHASING, SELLING OR TRANSFERRING CLAIMS AGAINST, INTEREST IN OR SECURITIES OF, THE DEBTOR SHOULD EVALUATE THIS DISCLOSURE STATEMENT ONLY IN LIGHT OF THE PURPOSE FOR WHICH IT WAS PREPARED.

THIS DISCLOSURE STATEMENT HAS NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS SUCH COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THE STATEMENTS CONTAINED HEREIN.

THIS DISCLOSURE STATEMENT WILL NOT BE CONSTRUED TO BE ADVICE ON THE TAX, SECURITIES OR OTHER LEGAL EFFECTS OF

THE PLAN. EACH CREDITOR AND INTEREST HOLDER SHOULD, THEREFORE, CONSULT WITH ITS OWN LEGAL, BUSINESS, FINANCIAL AND TAX ADVISORS AS TO ANY SUCH MATTERS CONCERNING THE SOLICITATION, THE PLAN OR THE TRANSACTIONS CONTEMPLATED THEREBY.

This Disclosure Statement is dated as of July 16, 2004. The Bankruptcy Court will hold a hearing on confirmation of the Plan (the "Confirmation Hearing") beginning at 1:30 p.m. (prevailing Eastern Standard/Daylight time) on September 14, 2004, in the United States Bankruptcy Court for the Southern District of Florida, 299 E. Broward Boulevard, Room 308, Fort Lauderdale, Florida 33301. At the Confirmation Hearing, the Bankruptcy Court will consider whether the Plan satisfies the requirements of the Bankruptcy Code, and will review a ballot report concerning votes cast for acceptance or rejection of the Plan.

To obtain, at your cost, additional copies of this Disclosure Statement or of the Plan, please contact:

By mail:
BMC
Attn:Piccadilly Voting Agent
P.O. Box 973
El Segundo, CA 90245
Fax No.: 310-640-8071
Telephone No.: 888-909-0100

By hand-delivery:
BMC
Attn:Piccadilly Voting Agent
1330 East Franklin Avenue
El Segundo, CA 90245

A. Overview of the Plan

Chapter 11 is the chapter of the Bankruptcy Code primarily used for business reorganization. The fundamental purpose of a chapter 11 case is to formulate a plan to restructure a debtor's finances so as to maximize recoveries to its creditors. With this purpose in mind, businesses sometimes use chapter 11 as a means to conduct asset sales and other forms of liquidation. Whether the aim is reorganization or liquidation, a chapter 11 plan sets forth and governs the treatment and rights to be afforded to creditors and stockholders with respect to their claims against and equity interests in a debtor's bankruptcy estate.

In formulating the Plan, the Proponents have conducted substantial legal and factual diligence and have engaged in discussions with certain secured creditors, including the Ad Hoc Committee, which consists of the holders of the Debtor's senior secured notes which, in the aggregate hold approximately 90% of the face amount of the Debtor's outstanding senior secured notes (the "Ad Hoc Committee") regarding the terms of a chapter 11 plan and related issues. These discussions addressed, among other things, a variety of inter-creditor and debtor-creditor disputes and the best means of facilitating an orderly and efficient distribution of the value of the Debtor's assets to its creditors. Simultaneously, the various parties engaged in negotiations among themselves regarding the resolution of these same issues and disputes. The Plan reflects agreements and compromises between the Debtor, the Ad Hoc Committee, the Creditors' Committee and other interested parties. The Debtor and Creditors' Committee propose and fully support the Plan, including the agreements and compromises contained therein.

The Plan is intended as a global compromise, predicated on the settlement of diverse disputes between different creditor constituencies, as well as

between the Debtor and its creditors. The Proponents believe that this global resolution is within the range of reasonableness, given the complex set of issues discussed with and among the various parties, and is in the best interest of Creditors. A more detailed description of the settlement, as reflected in the Global Settlement Agreement (as defined below), can be found in Section III.I of this Disclosure Statement. While litigating these various disputes to conclusion might result in different treatment of some creditors than under the Plan, the Proponents believe that the Plan will expedite distribution to all creditors and increase their aggregate recoveries by limiting the duration of the Chapter 11 Case and avoiding substantial costs of protracted litigation.

The Plan divides the Claims against and Interests in the Debtor into Classes. The Plan assigns all other Claims and Interests as described below.

1.1 *Class 1:* ***Priority Claims***. Class 1 consists of all Claims given priority in payment pursuant to Section 507 of the Bankruptcy Code, but not including Priority Tax Claims, and Administrative Claims.

1.2 *Class 2:* ***Secured Claims***. Class 2 consists of all Secured Claims other than Secured Claims held by Wells Fargo Foothill and Noteholders. Each Secured Claim in Class 2 will receive on the Effective Date: (a) a Cash Payment equal to its Allowed Secured Claim; (b) Abandonment of the Collateral for the Allowed Secured Claim; or (c) such other treatment as to which the Proponents and the holder of the Secured Claim mutually agree.

1.3 *Class 3:* ***General Unsecured Creditors***. Class 3 consists of the claims of all General Unsecured Creditors, which shall receive the balance of any

remaining Sale Proceeds and Assets of the Debtor's estate as part of the Unsecured Fund. Class 3 will not be paid in full, but will receive an initial dividend on (or as soon as practicable after) the Effective Date, and may also receive subsequent dividends as funding in the Unsecured Fund permits.

1.4 *Class 4: **Interest Holders***. Class 4 consists of the interests of all Interest Holders, which shall receive no distribution under the Plan. Class 4 interests will be canceled as of the Effective Date.

B. Voting Instructions

THE PROPONENTS, INCLUDING THE CREDITORS' COMMITTEE, STRONGLY RECOMMEND THAT EACH CREDITOR ENTITLED TO VOTE ON THE PLAN VOTE TO ACCEPT THE PLAN.

The Bankruptcy Code entities only holders of impaired claims or equity interests who receive some distribution under a proposed plan to vote to accept or reject that plan. Holders of claims or equity interests that are unimpaired under a proposed plan are conclusively presumed to have accepted that plan and are not entitled to vote on it. Holders of classes of claims or equity interests that will receive no distributions under a proposed plan are conclusively presumed to reject that plan and, therefore, are also not entitled to vote on it.

The holders of Claims in Classes 1 and 2 are not Impaired under the Plan. Thus, pursuant to section 1126(f) of the Bankruptcy Code, the claimants in Classes 1 and 2 are deemed to have accepted the Plan.

The holders of Claims in Class 3 are Impaired and thus may vote to accept or reject the Plan. The Proponents have enclosed Ballots with this Disclosure Statement to solicit the votes of all claimants in Class 3.

The holders of Class 4 Interests will receive no distribution under the Plan, nor retain their equity interests. Thus, pursuant to section 1126(g) of the Bankruptcy Code, the holders of Class 4 Interests are deemed to have rejected the Plan.

A BALLOT FOR ACCEPTANCE OR REJECTION OF THE PLAN IS BEING PROVIDED ONLY TO HOLDERS OF CLAIMS IN CLASS E. BEFORE VOTING, SUCH HOLDERS SHOULD READ THIS DISCLOSURE STATEMENT AND ITS EXHIBITS, INCLUDING THE PLAN AND THE PLAN DOCUMENTS, IN THEIR ENTIRETY.

You may vote on the Plan by completing the enclosed Ballot and mailing the original ballot to the United States Bankruptcy Court, at the following address:

By mail or hand-delivery:

United States Bankruptcy Court
Attn: Clerk's Office
299 E. Broward Boulevard, Room 112
Fort Lauderdale, FL 33301

You should use the Ballot sent to you with this Disclosure Statement to cast your vote for or against the Plan. You may not cast Ballots or votes orally or by facsimile. **In order for your Ballot to be considered by the Bankruptcy Court, it must be received at the above address by 5:00 p.m.**

(prevailing Eastern Standard/Daylight time) on September 3, 2004 (the "Voting Deadline"). If you are a claimant in Class 3, and you did not receive a Ballot with this Disclosure Statement, Please contact:

By mail:
BMC
Attn:Piccadilly Voting Agent
P.O. Box 973
El Segundo, CA 90245
Fax No.: 310-640-8071
Telephone No.: 888-909-0100

By hand-delivery:
BMC
Attn:Piccadilly Voting Agent
1330 East Franklin Avenue
El Segundo, CA 90245

Only holders of Allowed Claims in Impaired Classes of Claims are entitled to vote on the Plan. **Any Ballot executed by the holder of an Allowed Claim, but which does not indicate acceptance or rejection of the Plan, will be disqualified and will not be considered for any reason. An Impaired class of Claims accepts the Plan if at least two-thirds (2/3) in amount and more than one-half (1/2) in number of the Allowed Claims in the Class that actually vote are cast in favor of the Plan.** Whether or not a creditor votes on the Plan, such Person will be bound by the terms and treatment set forth in the Plan if the Bankruptcy Code confirms the Plan. Pursuant to the provisions of section 1126 of the Bankruptcy Code, the Bankruptcy Court may disallow any vote accepting or rejecting the Plan if the vote is not cast in good faith.

If the voting members of an Impaired Class do not vote unanimously for the Plan but, nonetheless, vote for the Plan by at least the requisite two-thirds (2/3) in amount and one-half (1/2) in number of Allowed Claims in that Class actually voted, the Plan,

at a minimum, must provide that each member of such Class will receive properly of a value as of the Effective Date, that is not less than the amount such Class members would receive or retain if the Debtor were liquidated under chapter 7 of the Bankruptcy Code.

The Debtor disputes certain proofs of Claim that have been filed or that the Debtor listed as disputed in the schedules the Debtor filed with the Bankruptcy Court. Persons whose Claims are disputed may vote on or otherwise participate in distributions under the Plan only to the extent that the Bankruptcy Court allows their Claims. The Bankruptcy Court may temporarily allow a Claim for voting purposes only. Allowance of a Claim for voting purposes or disallowance of a Claim for voting purposes does not necessarily mean that all or a portion of that Claim will be allowed or disallowed for distribution purposes. The Debtor's schedules listing Claims and whether such Claims are disputed can be inspected at the Office of the Clerk of the United States Bankruptcy Court for the Southern District of Florida, 299 E. Broward Boulevard, Room 112, Fort Lauderdale, Florida, or at the offices of Bankruptcy Management Corporation, the Debtor's Balloting Agent, as set forth above.

The Bankruptcy Court established March 10, 2004 as the bar date by which all proofs of Claim were required to be filed, except Administrative Claims, the deadline for which was May 31, 2004 (the "Administrative Claims Bar Date"). In accordance with section 502(b)(9) of the Bankruptcy Code and by order of the Bankruptcy Court, claims of governmental entities, including the PBGC claim, were to be filed on or before June 8, 2004.

Holders of Administrative Claims, excluding all Professionals or other Persons requesting

compensation or reimbursement of expenses pursuant to sections 327, 328, 330, 331, 503(b) or 1103 of the Bankruptcy Code for services rendered on or before the Confirmation Date (including any compensation requested by any Professional or any Persons for making a substantial contribution in the Chapter 11 Case), that are required to file a request for payment of such Claims and that do not file such request on or before the Administrative Claims Bar Date will be forever barred from asserting such Claims against the Proponents, the Estate, the Plan Administrator or any of their respective Assets.

C. Cramdown

Once it is determined which Impaired classes have accepted the Plan, the Bankruptcy Court will determine whether the Plan may be confirmed. Interest Holders receive no distribution on account of their Interests nor retain their Interests. Therefore, Class 4 is deemed to have rejected the Plan. However, the Bankruptcy Court may confirm the Plan even if all but one of the Impaired classes do not accept the Plan if the Bankruptcy Court finds that at least one impaired class of Claims (not including any acceptances by "insiders" as defined in section 101(31) of the Bankruptcy Code) has accepted the Plan and that certain additional conditions are met. The Debtor will therefore request that the Bankruptcy Court confirm the Plan under the "cramdown" provision of section 1129(b) of the Bankruptcy Code with respect to any non-accepting Class of Claims or Interests.

Section 1129(b) of the Bankruptcy Code is generally referred to as the "cramdown" provision. Pursuant to the cramdown provision, the Bankruptcy

Court may confirm the Plan over the objection of a non-accepting class of Secured Claims if the Plan is fair and equitable and satisfies one of the alternative requirements of section 1129(b)(2)(A) of the Bankruptcy Code. Likewise, the Bankruptcy Court may confirm the Plan over the objection of a non-accepting class of Unsecured Claims if the Plan is fair and equitable and if the non-accepting claimants will receive the full value of their claims, or (even if the non-accepting claimants receive less than full value), if no class of junior priority will receive or retain anything on account of its Prepetition Claims or Interests.

THESE ARE COMPLEX STATUTORY PROVISIONS, AND THE PRECEDING PARAGRAPHS ARE NOT INTENDED TO BE A COMPLETE SUMMARY OF THE LAW. IF YOU DO NOT UNDERSTAND THESE PROVISIONS, PLEASE CONSULT WITH YOUR ATTORNEY. BECAUSE THE HOLDERS OF INTERESTS IN CLASS 4 RECEIVE NO DISTRIBUTION ON ACCOUNT OF THEIR INTERESTS AND ARE THUS DEEMED TO HAVE REJECTED THE PLAN, THE DEBTOR INTENDS TO RELY UPON THE "CRAMDOWN" PROVISION OF SECTION 1129(b) OF THE BANKRUPTCY CODE AS TO CLASS 4.

II. BACKGROUND OF THE DEBTOR

The Debtor is a publicly traded company under the symbol: PICZQ. This Disclosure Statement discusses the Debtor's financial condition and results of operation. You should refer also to Piccadilly Cafeteria, Inc.'s Form 10-K for the fiscal year ended July 1, 2003, and also to Form 10-Q for the

fiscal quarter ended September 30, 2003, which have been filed with the Securities and Exchange Commission (the "SEC"), and are available on the SEC's website at www.sec.gov. Any creditor or interested party not having access to the internet, may obtain a copy of the most recent form 10-K by requesting it, in writing, of Berger Singerman, P.A., Attn.: Kerry L. Goins, Berger Singerman, P.A., 350 East Las Olas Blvd., Suite 1000, Ft. Lauderdale, FL 33301, Facsimile (954) 523-2872, email kgoins@bergersingerman.com.

A. The Debtor

The Debtor was founded in 1944, is one of the largest chains of cafeteria restaurants in the United States, and is the dominant cafeteria chain in the Southeastern and Mid-Atlantic regions.

As of October 29, 2003, (the "Petition Date"), the Debtor operated 145 cafeterias located in fifteen states, including Alabama, Florida, Georgia, Kansas, Kentucky, Louisiana, Maryland, Missouri, Mississippi, North Carolina, South Carolina, Oklahoma, Tennessee, Texas and Virginia. As of the Petition Date, the Debtor maintained a total of 34 locations in Florida. The Debtor held title to the real estate and improvements thereon at four of the stores located in Florida, including the store located at 7200 North University Drive, Tamarac, Florida 33321. The Debtor maintained more locations in Florida than in any other state where the Debtor operated. The Debtor generated $320 million in net sales for the fiscal year ended July 1, 2003. Approximately 20% of the Debtor's annual revenues for the fiscal year ended July 1, 2003 were derived from its Florida operations.

Piccadilly Cafeterias, Inc. served a diverse and loyal customer base consisting of families, groups of

friends and co-workers, senior citizens, couples, and students. Its patrons enjoyed a wide selection of convenient, healthy, freshly prepared "home cooked" meals at value-oriented prices for lunch and dinner.

Piccadilly's cafeterias operated principally under the "Piccadilly Cafeteria" name and service mark, which registered with the United States Patent and Trademark Office for a term presently expiring in January 2009. Registered service marks may continually be renewed for ten-year periods.

All of Piccadilly's cafeterias were located in urban and suburban areas in a variety of strip shopping centers, malls, and freestanding buildings. All of the cafeterias located in strip shopping centers and malls are leased properties. Of the 65 cafeterias located in freestanding buildings, Piccadilly owned the building and land for nine of the cafeterias on properties that are subject to long-term leases.

Piccadilly's cafeterias averaged 10,603 square feet in size and seated, on average, approximately 250 guests.

Historically, Piccadilly financed its operations and growth from its operations and from secured credit facilities provided to Piccadilly by the Prepetition Secured Creditors. In addition, Piccadilly's shares had been publicly traded on American Stock Exchange under the symbol "PIC" or, currently, "PICZQ." Piccadilly's obligations under the secured credit facilities owing to the Prepetition Secured Creditors consisted of the following:

(a) the principle balance due under the revolving credit facility was approximately $9 million, plus interest, fees, costs and expenses, and the balance due under the Letter of Credit sub-facility of the Prepetition Credit Agreement was approximately $4 million, plus interest, fees, costs and expenses; and

(b) the principle balance due under the Senior Secured Notes due in 2007 dated as of December 12, 2000, as amended, restated or supplemented from time to time was approximately $39.9 million, plus interest, fees, costs and expenses.

On May 29, 1998, Piccadilly acquired Morrison Restaurants, Inc.'s cafeteria chain through a cash tender offer at $5 per share (the "Morrison's Acquisition"). The Company's total acquisition cost included $10.4 million in assumed debt, and aggregated to approximately $57.3 million. Through the Morrison Acquisition, Piccadilly acquired 142 restaurants operating in 13 Southeastern and Mid-Atlantic states.

In the fall of 1998, Piccadilly converted 23 of the Morrison cafeterias acquired in the Morrison Acquisition to the Piccadilly brand. These 23 cafeterias were primarily located in and around Atlanta, Georgia. Guest reaction to the conversions was initially positive resulting in year over year sales improvements. Piccadilly responded to these trends by accelerating the time-table under which the remaining Morrison cafeterias were scheduled to convert to the Piccadilly brand.

B. Events Leading to Chapter 11

By the end of fiscal year 1999, Piccadilly was operating 254 stores that generated net sales of approximately $496 million. However, Piccadilly's per store operating results declined in that and all subsequent years, leading eventually to its Chapter 11 filing. The principal factors contributing to these declines were the American public's declining patronage of cafeteria style restaurants, exacerbated first by a poor reception to the Company's conversion of the Morrison's cafeterias to the Piccadilly brand,

and then by the general economic malaise triggered by the events of September 11, 2001. Piccadilly's total net sales for Fiscal Year 2003 were $320 million, as compared to net sales of $350 million in the prior year. Although underperforming cafeterias closed in Fiscal Year 2003 accounted for $7.7 million of this $30 million total decline, the remaining decline of $22.7 million reflected that same-store net sales fell by 7.3% and same-store guest traffic declined by 9.1%. Finally, Piccadilly continuing operations incurred losses of $1.3 million for Fiscal Year 2003, and its unaudited financial statements for the fiscal quarter ended September 30, 2003 reflect a $1.3 million loss.

During the quarter ended December 31, 2002, Piccadilly's management concluded that the Company needed to reorganize its operations and reduce its under-performing store locations. Piccadilly identified 48 then-operating cafeterias as under-performing stores and concluded that those stores needed rent concessions or to terminate operations. Piccadilly therefore retained Retail Consulting Services, Inc. ("RCS"), a consulting firm with significant experience in renegotiating leases with regional and nationwide landlords, to re-negotiate these leases. RCS engaged in one on one discussions with landlords in an effort to secure more favorable lease arrangements, including rent reductions, buyouts or early lease terminations.

During the process of negotiating buyouts or early terminations and closing stores, Piccadilly also assessed its liabilities under pension plans, and ultimately concluded that its liabilities to landlords and to these pension plans could not be paid from operations or by obtaining financing, and could only be resolved through a Chapter 11 Case. At the Petition Date, Piccadilly faced liability under approximately 57 leases covering cafeterias that were closed (collectively, the "Previously Closed

Cafeterias"). Piccadilly is the sponsor of the Piccadilly Cafeterias, Inc. Pension Plan, and is one of three sponsors of the Morrison Retirement Plan, both of which are qualified, defined benefit plans (the "Defined Plans"). Although benefit accruals in the Defined Plans ceased before the Petition Date, the Company faced substantial shortfalls between benefits payable under the Defined Plans and the assets available to pay them. At the end of Fiscal 2003, Piccadilly estimated that shortfall as approximately $42 million. Before the start of the Chapter 11 Case, Piccadilly's senior management and external counsel met with the Pension Benefit Guaranty Corp. to evaluate the wind-down and termination of the Defined Plans. Immediately prior to the Petition Date, Piccadilly determined that it could not pay the $5 million installment payment due under its Senior Secured Notes by October 28, 2003. Similarly, Piccadilly could not pay its actuarial estimate for required contributions to the Defined Plan in calendar year 2004 (approximately $7-12 million).

On May 5, 2003, Piccadilly announced that Ronald A. LaBorde resigned as Chief Executive Officer of Piccadilly, and that it had entered into an agreement with PMCM, LLC ("PMCM") as affiliate of Phoenix Management Services, Inc. to provide financial advisory, management and restructuring Services to Piccadilly. Phoenix is an operational focused turnaround management firm. Under that agreement, PMCM agreed to provide Piccadilly the services of (a) Mr. Vincent J. Colistra, as Chief Restructuring Officer of Piccadilly, and (b) John G. McGregor, as Interim Chief Executive Officer of Piccadilly.

Thereafter, with the assistance of PMCM, Piccadilly reviewed and analyzed its strategic

alternatives, including both its ability to return to profitability on a stand-alone basis and other strategic options to protect Piccadilly's overall business, as well as the interests of its creditors and employees. After concluding that analysis, on June 30, 2003, Piccadilly announced that it would pursue a range of strategic options, including a potential sale of Piccadilly, in an effort to maximize its enterprise value for the benefit of its constituencies. Although Piccadilly retained the option to pursue a stand-alone reorganization, the substantial nature of its pension plan liabilities and its lease rejection claims argued strongly against that alternative and in favor of a sale of the going concern. Since the June 30, 2003 announcement, PMCM and Piccadilly undertook efforts to market and sell Piccadilly's assets (the "Acquired Assets" or "Asset"). These efforts included preparation of a confidential, comprehensive descriptive memorandum, prepared by PMCM with the assistance of management, detailing Piccadilly's assets, liabilities, past financial information and projections (the "Sales Memorandum"), and assembling a "data room" of due diligence information.

To initiate these marketing efforts, PMCM first identified 223 potential financial or strategic buyers for Piccadilly (the "Initial Contacts"), and sent brief initial solicitation materials to them. PMCM identified the Initial Contacts, with assistance from Piccadilly's management, using various databases and other resources.

Of the 223 Initial Contacts, PMCM obtained indications of interest from numerous parties, of which 38 executed confidentiality agreements and received, in response, the Sales Memorandum. PMCM contacted each of these parties and engaged in various levels of discussions and negotiations with them, and as a result of this process, Piccadilly

received six non-binding bids or indications of interest (collectively, the "Initial Bids").

Beginning in August 2003, PMCM and Piccadilly management commenced negotiations and discussions with prospective purchasers ("Prospective Acquires of Piccadilly's Assets", or "PAPAs") that submitted the Initial bids, ultimately meeting with representatives of four of them. PMCM and management made information available for due diligence to those entities through September 23, 2003, the date on which Piccadilly requested formal acquisition offers.

The best and highest offer was made by Piccadilly Acquisition Corporation, an affiliate of TruFoods Corporation ("PAC"). Having identified the highest bid, PMCM negotiated with PAC regarding the terms and conditions of an acquisition agreement. These negotiations resulted in the execution of an Asset Purchase Agreement, dated as of October 29, 2003, by and between Piccadilly and PAC (the "PAC Purchase Agreement"). The PAC Purchase Agreement provided for a $54 million purchase price for the Acquired Assets, subject to certain working capital and other adjustments, and for PAC to assume certain liabilities, including employee claims and payables that would otherwise have administrative priority in the Chapter 11 Case. The PAC Purchase Agreement also contemplated bidding procedures and an auction process and allowed the Debtor to seek a higher and better purchase offer for the Assets.

III. THE CHAPTER 11 CASE

A. Commencement of the Chapter 11 Case

On October 29, 2003 (the "Petition Date"), the Debtor filed its voluntary petition under chapter 11 of

the Code (Court Paper "C.P." No. 1). The Debtor has continued to operate its business as a Debtor-in-Possession pursuant to 11 U.S.C. §§ 1107 and 1108. On November 10, 2003, the United States Trustee constituted the Creditors' Committee. The members of the Creditors' Committee are identified in the *Appointment and Notice of Appointment of Committee of Creditors Holding Unsecured Claims* dated November 10, 2003 (C.P. No. 80). The Creditors' Committee has been an active participant in the post-petition undertakings of the Debtor leading up to the formation and proposal of this Disclosure Statement and the Plan.

* * *

D. Appointment of Creditors' Committee

On November 10, 2003, the United States Trustee appointed the Creditors' Committee to represent the interests of the Debtor's unsecured creditors. Since its formation, the Debtor has consulted with the Creditors' Committee concerning the administration of the Chapter 11 Case. The Debtor has kept the Creditors' Committee informed about its operations and has sought its concurrence for actions and transactions taken outside of the ordinary course of the Debtor's business. The Creditors' Committee has participated actively, together with the Debtor's management and professionals, in negotiation of the Plan.

The Creditors' Committee consists of the following members: Simon Property Group, LP, Hibernia National Bank, The Coca-Cola Company, Infinite Energy, Inc., CBL & Associates Management, Inc., Sawyer Real Estate, and Colonial Realty Limited Partnership.

* * *

H. Sale of Substantially All Assets of the Debtor to the Successful Purchaser

1. Introduction

As previously discussed, Piccadilly conducted a thorough search for a "stalking horse" asset purchase buyer prior to commencing the Chapter 11 Case, through the efforts of PMCM, LLC ("PMCM") as affiliate of Phoenix Management Services, Inc. and culminated these efforts with the execution of an Asset Purchase Agreement, dated as of October 29, 2003, by and between Piccadilly and PAC the "PAC Purchase Agreement"). The PAC Purchase Agreement provided for a $54 million purchase price, for the Acquired Assets, subject to certain working capital and other adjustments. Piccadilly and its advisors sought to execute the PAC Purchase Agreement in order to provide a "floor" price for the Assets and the framework for a chapter 11 plan of reorganization, with the hope and expectation that they would seek to improve the $54 million price during the proceedings. The PAC Purchase Agreement, therefore, also contemplated bidding procedures and an auction process and allowed the Debtor to seek a higher and better purchase offer for the Assets.

2. The Sale Process

On October 29, 2003 and October 30, 2003, respectively, the Debtor filed *Debtor's Motion for (a) Approval of Sale of Substantially All of Its Assets Outside the Ordinary Course of Business, Free and Clear of All Liens, Claims, Encumbrances and Interests; and (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and*

Unexpired Leases (C.P. No. 21) *and Debtor's Amended Motion for (1) Approval of Sale of Substantially All of Its Assets Outside the Ordinary Course of Business, Free and Clear of All Liens, Claims, Encumbrances and Interests; and (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases* (C.P. No. 22) (collectively, the "Sale Motion"), requesting authorization to (i) approve, authorize and ratify the PAC Purchase Agreement, and the sale of the Acquired Assets to PAC, or such other financially qualified bidder who submits a higher and better offer at an auction in accordance with certain bidding procedures approved by the Court; and (ii) assume and assign certain executor contracts and unexpired leases to PAC, or such other financially qualified bidder that submits a higher and better offer at an auction in accordance with certain bidding procedures approved by the Court.

On November 7, 2003, the Debtor filed a *Motion by Debtor for Entry of Order (A) Approving Competitive Bidding and Sale Procedures' (B) Approving Form of Asset Purchase Agreement; (C) Approving Form and Manner of Notices; (D) Scheduling Hearing Dates to Conduct Auction and to Consider Final Approval of Sale Including Treatment of Executory Contracts and Unexpired Leases; and (E) Granting Related Relief* (C.P. No. 67) (the "Bid Procedures Motion"), requesting authorization to (i) approve certain competitive bidding and sale procedures; (ii) approve the form of the PAC Purchase Agreement; (iii) approve the form and manner of notices; and (iv) scheduling a hearing to consider final approval of the sale of the Acquired Assets and treatment of executor contracts and unexpired leases.

In accordance with the Bid Procedures Motion, the Debtor requested that only Qualified Bidders be permitted to submit bids for the Acquired Assets, or

otherwise participate in the auction. In addition, due to the proposed buyer's expenditure of considerable time, money and energy in pursuing the sale, the Debtor sought approval of certain bidding protections to the proposed buyer, including the Break-Up Fee.

In accordance with the Bid Procedures Motion, the Debtor requested that only Qualified Bidders be permitted to submit bids for the Acquired Assets, or otherwise participate in the auction. In addition, due to the proposed buyer's expenditure of considerable time, money and energy in pursuing the sale, the Debtor sought approval of certain bidding protections to the proposed buyer, including the Break-Up Fee.

On November 28, 2003, the Ad Hoc Committee filed an objection (C.P. No. 146) to the Bid Procedures Motion. In addition, on November 28, 2003, the Creditors' Committee filed an objection (C.P. No. 145) to the Bid Procedures Motion. On December 4, 2003, the Court entered an *Order (A) Approving Amended Competitive Bidding and Sale Procedures, and Bid Protections, (B) Approving Amended Form of Asset Purchase Agreement, (C) Approving Form and Manner of Notices, (D) Scheduling Hearing Dates to Conduct Auction and to Consider Final Approval of Sale Including Treatment of Executory Contracts and Unexpired Leases, and (E) Granting Related Relief* (C.P. No. 194) ("Bid Procedures Order"), thereby overruling the objections filed thereto, scheduling a hearing to consider the Sale for February 13, 2004, approving the conducting of an auction, approving a Break-Up Fee in the amount of $1,620,000 inclusive of reimbursement of expenses, and other bid procedures with respect to Qualified Bidders. On December 11, 2003, the Court entered an *Amended Order (A) Approving Amended Competitive Bidding and Sale Procedures, and Bid Protections, (B) Approving Amended Form of Asset Purchase Agreement, (C)*

Approving Form and Manner of Notices, (D) Scheduling Hearing Dates to Conduct Auction and to Consider Final Approval of Sale Including Treatment of Executory Contracts and Unexpired Leases, and (E) Granting Related Relief (C.P. No. 208).

In accordance with the Bid Procedures Order, the Debtor received a qualified bid from Piccadilly Investments, LLC for the purchase of the Debtor's Assets, thereby increasing the purchase price from $54,000,000 to $55,800,000. Piccadilly Investments, LLC is an acquisition company jointly owned by The Yucaipa Companies and Diversified Investment Management Group, two Los Angeles-based private equity firms.

After intense competitive bidding at an auction conducted on February 10, 2004, between PAC and Piccadilly Investments, LLC, the successful bid was submitted in the amount of $80 million by Piccadilly Investments, LLC (the "Successful Purchaser"). The $80 million offer by the Successful Purchaser for the purchase of the Debtor's Assets was the highest and best offer obtained for the Debtor's Assets.

On February 13, 2004, the Bankruptcy Court conducted a hearing to consider the Sale Motion, and entered an *Order Approving the Sale of Assets Free and Clear of All Liens, Claims, Interests and Encumbrances and the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases* (C.P. No. 347) (the "Sale Order"). The Sale Order approved the sale of the Debtor's Assets to the Purchaser for the purchase price of 980 million, and approved the assumption, assignment and transfer of the assumed contracts free and clear of all liens, claims, interests and encumbrances, except for the Assumed Liabilities and Permitted Liens (as defined in the Asset Purchase Agreement and Auction Amendment to Asset Purchase Agreement attached to

the Sale Order as exhibits), and overruling objections to the Sale Motion filed by Henrico County, Virginia (C.P. No. 142); Priet-Rubin, Inc. (C.P. No. 155); Jefferson County, Harris County Houston ISD, and City of Houston (C.P. No. 162), Fayette County, Georgia Tax Commissioner (C.P. No. 178); Florida Department of Revenue (C.P. No. 186); M. Palazola Produce Company (C.P. No. 216); Aronov Realty Management, Inc. (C.P. No. 318); Palm Beach County Tax Collector (C.P. No. 321); and the Creditors' Committee (C.P. No. 343).

On March 16, 2004, the Successful Purchaser closed on its purchase of the Debtor's Acquired Assets.

On March 31, 2004, the *Debtor filed Debtor's Motion for Order Authorizing Name Change of Debtor From Piccadilly Cafeterias, Inc. to Capital City Cornichon Corp.* (C.P. No. 481), as included within the assets purchased by the Successful Purchaser was all intellectual property, including, but not limited to the name "Piccadilly," "Piccadilly Cafeterias, "Morrison's" or variations thereof (whether or not used in the ownership and operation of the business). The Court authorized the Debtor's name change by Order dated April 27, 2004 (the "Name Change Order"), thereby authorizing the Debtor's name change to Capital City Cornichon Corp. The Name Change Order directed that any and all pleadings filed in the Debtor's bankruptcy case that reference the Debtor, including the caption on any and all pleadings, shall reference the Debtor as Piccadilly Cafeterias Inc., now known as Capital City Cornichon Corp.

I. Global Settlement Agreement

On or about January 26, 2004, the Debtor, the Ad Hoc Committee and the Creditors' Committee entered into a Global Settlement Agreement, which

sets forth certain terms of Settlement with respect to the (i) objections to the Sale filed by the Ad Hoc Committee and the Creditors' Committee; (ii) distribution of the proceeds realized by the Debtor from the Sale of the Debtor's Assets; (iii) resolution of the Motion to Transfer Venue; and (iv) the majority of the anticipated issues relating to the Plan. On February 2, 2004, the Debtor filed its *Motion to Approve Compromise and Settlement By and Between the Debtor, the Ad Hoc Committee of Senior Secured Noteholders and the Official Committee of Unsecured Creditors* (C.P. No. 303) (the "Settlement Motion") requesting approval of the Global Settlement Agreement. The Global Settlement Agreement provides, in pertinent part, as follows:

(a) That it is subject to an order of the Bankruptcy Court approving it (which was entered on February 25, 2004), including the distribution of the proceeds of the Sale (the "Sale Proceeds") as proposed therein;

(b) That the Sale to the Purchaser, or other successful bidder at the auction, had to be approved by the Bankruptcy Court pursuant to section 363 of the Bankruptcy Code no later than February 13, 2004 (such an order was entered);

(c) That the proceeds from the Sale must be distributed to certain of the Debtor's Creditors immediately following the closing of the Sale, pursuant to a sharing "waterfall' formula to apply to Sale proceeds in excess of $54 million and less than $62 million. Because the Successful Purchaser paid $80 million, this formula became inapplicable, and the Sale proceeds were applied to pay Wells Fargo Foothill and the Noteholders in full (including all accrued interest, fees and costs), with remaining proceeds held by the estate to provide funds to pay the Allowed Priority Claims and Allowed Administrative

Claims in full and provide funds for a pro rata distribution in respect of General Unsecured Claims pursuant to the Plan.

(d) That in addition to their share of the Sale Proceeds, the General Unsecured Creditors would receive the cash surrender value from certain company-owned life insurance policies (the "COLI Proceeds") totaling approximately $2.9 million (together with their share of the Sale proceeds described below, the "Unsecured Fund").

(e) That the Ad Hoc Committee's willingness to pursue the Transaction is subject to conditions regarding the timing and amount of proceeds realized from the Sale, which conditions were fully satisfied.

(f) That in consideration of the global settlement, the Debtor and the Ad Hoc Committee shall release the Creditors' Committee and each other, and the Creditors' Committee shall release the Debtor and the Ad Hoc Committee, and its members, attorneys and advisors, of any and all claims or potential claims that may arise with respect to the Chapter 11 Case;

(g) That the Parties to the Global Settlement Agreement shall not object to and shall support the Sale and the Distribution Order;

(h) That the Parties to the Global Settlement Agreement shall support any liquidating plan proposed by the Creditors' Committee and the Debtor that is not contrary to the provisions of the Global Settlement Agreement. No plan or any other order of the Bankruptcy Court will have any effect or be inconsistent with the distributions to the Noteholders provided for herein. The Debtor and Creditors' Committee will promptly file and pursue confirmation of such a plan. The Creditors' Committee shall have sole discretion to set all the terms to administer the Plan to the extent funded with the Unsecured Funds, including the selection of a representative to perform

such administration. The Creditors' Committee acknowledges and agrees that confirmation of a plan shall not be a condition to the Global Settlement Agreement or the Creditors' Committee's support of the Distribution Order;

(i) That the Creditors' Committee agrees to waive all existing or potential objections to Wells Fargo Foothill's and the Noteholders' (the "Prepetition Secured Parties") pre-petition claims, and liens on the collateral securing the claims of Wells Fargo Foothill and the Noteholders, including the right to surcharge the Prepetition Secured Parties' collateral under section 506(c) of the Bankruptcy Code, such that the findings contained in the Cash Collateral Order shall be binding on the Creditors' Committee; provided, however, that all deadlines in the Cash Collateral Order for the Creditors' Committee to challenge the liens and claims of the Prepetition Secured Parties, including an objection pursuant to Section 552 of the Bankruptcy Code to the Prepetition Secured Parties' lien on cash, collateral shall be deemed suspended and tolled until 15 days after the Sale hearing, and the Creditors' Committee's right to raise such objections shall be preserved until such date only if the Sale is not consummated by such date, unless extended by mutual consent of the Ad Hoc Committee, Wells Fargo Foothill and the Creditors' Committee. The Parties further agreed to waive any and all other objections that would hinder completion of the provisions of the Global Settlement Agreement;

(j) That as provided in the Transition Services Agreement provided for pursuant to the Asset Purchase Agreement approved by the Court, the Successful Purchaser of the Debtor's Assets shall provide certain facilities, and make available certain books and records and management and professional personnel, to assist the representative administering

the Plan (the "Plan Administrator") as reasonably required for its functions, including claims reconciliation, prosecution of claims owned by the Unsecured Fund, and otherwise. The Creditors' Committee acknowledges and agrees that the failure of the Purchaser to perform or extend the term of the Transition Services Agreement shall not be a condition to this Global Settlement Agreement or the Creditors' Committee's support of the Distribution Order;

(k) That all Claims and causes of actions against third parties, including all actions arising under chapter 5 of the Bankruptcy Code and of director and officer ("D&O") claims shall be assigned to the Unsecured Fund; provided, however, that the Parties, on behalf of themselves and their successors and assigns, (i) covenant not to sue, or assert chapter 5 claims or any other claims or causes of action against the Noteholders or the Indenture Trustee, or their respective attorneys or advisors; (ii) covenant not to sue, or assert chapter 5 claims against, the former employees of the Debtor identified on Exhibit "B" attached to the Global Settlement Agreement in connection with distributions made to such employees from the Deferred Compensation Plan in the aggregate of $225,671.31; and (iii) agree to release to such participants (all of which were current employees of the Debtor), the $150,535.86, plus interest, which remained on deposit with Equitas in New Orleans. The Plan Administrator shall be designated an Estate representative for purposes of pursuing all claims and Causes of Action of the Debtor or the Estate; and

(l) That except as otherwise provided in the Global Settlement Agreement and with respect to Post-Confirmation Unsecured Fund administration costs, the Unsecured Fund as established upon

Confirmation (and giving effect thereto) shall be available only to General Unsecured Creditors, and in no instance shall be available for Administrative or Priority Claims.

1. Bankruptcy Court Approval

On February 4, 2004, the United States trustee filed an *Objection of United States Trustee to "Motion to Approve Compromise and Settlement By and Between the Debtor, the Ad Hoc Committee of Senior Secured Noteholders and the Official Committee of Unsecured Creditors"* (C.P. No. 315). The Court conducted a hearing on February 13, 2004, to consider approval of the Global Settlement Agreement, and thereupon entered an order approving the Global Settlement Agreement on February 25, 2004.

2. The Plan

The parties to the Global Settlement Agreement agreed to support, subject to the preparation and circulation of appropriaate disclosure and other materials required by applicable law, a plan of liquidation containing the terms substantially similar to the provisions set forth in the Global Settlement Agreement. The distributions contemplated under the Global Settlement Agreement; (a) to the Prepetition Secured Creditors, were made upon consummation of the Sale, (b) to administrative and priority claimants, will be made upon confirmation of the Plan, and (c) to holders of General Unsecured Claims, are substantially as set forth in the Plan and summarized in this Disclosure Statement.

J. The Claims Process

The Bankruptcy Code provides a procedure for all persons who believe they have a claim against a debtor to assert such claims, so that the claimant can receive distributions from the debtor's bankruptcy case. The bankruptcy court establishes a "bar date" a date by which creditors must file their claims, or else such claims will not participate in the bankruptcy case or any distribution. After the filing of all claims, the debtor evaluates such claims and can raise objections to them. These claims objections allow the debtor to minimize claims against it, and thereby maximize the recovery to creditors.

The Bankruptcy Court established the deadline for filing proofs of Claim against the Debtor, other than claims of governmental units, as March 10, 2004 (the "General Bar Date"). An Administrative Claims Bar Date was established as May 31, 2004, pursuant to this Court's *Order Granting Debtor's Motion to Fix Bar Date for Filing Applications Seeking Administrative Expenses and to Designate Form and Manner of Notice of Bar Date* dated April 27, 2004 (C.P. No. 565).

The Debtor and its professionals have been reviewing, analyzing and resolving Claims on an ongoing basis as part of the claims reconciliation process. To date approximately 1390 proofs ultimately be received by any particular holder of an Allowed Claim will be affected by the outcome of the claims resolution process. A summary of the pre-petition claims filed to date is attached as Exhibit "B."

The Company anticipates that the largest single unsecured creditor claim against this estate will be asserted by the Pension Benefit Guaranty Corp. ("PBGC"), a governmental entity that is entitled to assert claims for the Company's unfunded obligations under the Defined Plans. The PBGC was entitled to

an extended period in which to file its proof of claim as a governmental entity, and the Creditors' Committee will focus on reconciling this claim as one of its priorities. The process of reconciling and allowing the PBGC claim will largely determine the percentage dividend paid in respect of all unsecured claims. The claims of the PBGC are discussed below in Section K.

* * *

R. Distributable Proceeds

The Debtor estimates that, as a result of the Sale, the Global Settlement Agreement and other proceeds from the sale of residual assets and realization of claims, including the adversary proceedings discussed above that an amount in the approximate range of $24.3 million will be available for distribution by the Plan Administrator in accordance with the Plan. The amount that General Unsecured Creditors ultimately realize is subject to various contingencies, including resolution of the above adversary proceedings and collection of othe assets and the expenses associated therewith. A summary of the estimated proceeds available for distribution to the Plan Administrator before recovery under causes of action is set forth in attached Exhibit "F."

IV. CHAPTER 11 PLAN

THE FOLLOWING IS A SUMMARY OF CERTAIN OF THE MORE SIGNIFICANT MATTERS CONTEMPLATED BY OR IN CONNECTION WITH THE CONFIRMATION OF THE PLAN. THUS, THE FOLLOWING SUMMARY IS QUALIFIED IN ITS ENTIRETY BY THE PLAN, WHICH IS ATTACHED TO THIS

DISCLOSURE STATEMENT AS EXHIBIT A. IF THERE IS ANY INCONSISTENCY BETWEEN THE DISCLOSURE STATEMENT AND THE PLAN, THE PLAN CONTROLS. THIS SUMMARY ONLY HIGHLIGHTS CERTAIN SUBSTANTIVE PROVISIONS OF THE PLAN. CONSIDERATION OF THIS SUMMARY WILL NOT, NOR IS IT INTENDED TO, CREATE A THOROUGH UNDERSTANDING OF THE PLAN. SUCH CONSIDERATION IS NOT A SUBSTITUTE FOR A FULL AND COMPLETE READING OF THE PLAN. ALL HOLDERS OF CLAIMS AND INTERESTS ARE URGED TO REVIEW THE PLAN CAREFULLY. THE PLAN, IF CONFIRMED, WILL BE BINDING ON THE DEBTOR AND ALL HOLDERS OF CLAIMS AND INTERESTS.

A. Plan Overview

The Plan represents a settlement and compromise of numerous potential disputes, principally those set forth in Section III above. The Proponents believe that the litigation of these various disputes in the Chapter 11 Case could consume hundreds of thousands of dollars that could otherwise be distributed to creditors and delay actual cash distributions to creditors for many months, and possibly years. Accordingly, the Proponents believe that a compromise of these disputes in the Plan is in the best interests of all creditors, both maximizing and expediting overall recoveries in the Chapter 11 Case.

The Plan classifies Claims and Interests as follows: Class 1 Allowed Priority Claims; Class 2 Allowed Secured Claims; Class 3 Allowed General

Unsecured Claims and Class 4 Allowed Interests Holders. Classes 1 and 2 are Unimpaired and Classes 3 and 4 are Impaired.

B. Unclassified Claims

Subject to the allowance procedures and deadlines provided herein, on the Effective Date or as soon thereafter as is practicable, the holder of an Allowed Administrative Claim shall receive on account of such Allowed Administrative Claim and in full satisfaction, settlement, release and discharge of and in exchange for such Allowed Administrative Claim, (a) Cash equal to the unpaid portion of such Allowed Administrative Claim or (b) such other treatment as to which the Debtor and the holder of such Allowed Administrative Claim have agreed upon in writing. However, (i) Allowed Administrative Claims with respect to liabilities incurred by the Debtor in the ordinary course of business during the Chapter 11 Case shall be paid in the ordinary course of business in accordance with the terms and conditions of any agreement or course of dealing relating thereto, (ii) Professional Claims shall be paid in accordance with Section 2.4, and (iii) any Claims arising under the Asset Purchase Agreement shall be treated in accordance with the Asset Purchase Agreement. The Break-Up Fee was paid in full at the Closing and any claims of PAC against the Proponents or the Estate are satisfied in full and therefore released, including any and all claims that PAC may have relating to the PAC Purchase Agreement, the Sale Motion, the Sale Order, the Auction or any other aspect of the Sale process. Further, the Secured Claims of Wells Fargo Foothill and the Noteholders were paid in full at Closing and

have no further Claims against the Estate or the Proponents.

The Debtor/Plan Administrative will pay the United States Trustee the appropriate sum required pursuant to 28 U.S.C. § 1930(a)(6) within ten days from the entry of an order confirming the Plan for pre-confirmation periods and simultaneously provide to the United States Trustee an appropriate affidavit indicating the cash disbursements for the relevant period. In addition, the Debtor/Plan Administrator will pay the United States Trustee the appropriate sum required pursuant to 28 U.S.C. § 1930 (a)(6) for post-confirmation periods within the time period set forth in 28 U.S.C. § 1930(a)(6), based upon all post-confirmation disbursements made by the Debtor until the earlier of the closing of this case by the issuance of final decree by the Bankruptcy Court, or upon the entry of an order by the Bankruptcy Court dismissing the Chapter 11 Case or converting the case to another chapter under the Bankruptcy Code, and the Debtor/Plan Administrator will provide to the United States Trustee upon the payment of each post-confirmation payment an appropriate affidavit indicating all the cash disbursements for the relevant period.

Each Professional in the Chapter 11 Case will file with the Bankruptcy Court its final fee application seeking final approval of all fees and expenses from the Petition Date through the Confirmation Date. The Scheduling Order entered by the Court for the filing of Professional fee applications will govern the filing of fee applications for Professionals through the Confirmation Date.

As of the Confirmation Date, any requirement that Professionals comply with sections 327 through 331 of the Bankruptcy Code in seeking retention or compensation for services rendered after such date will be modified to provide for the filing of monthly statements with the Court, with a copy to the United States Trustee, the Plan Administrator, the Post Confirmation Creditors' Committee and the Debtor. If no objection is filed to such monthly statements within 10 days of service, then such monthly statements will be authorized for payment. Any objections to such monthly statements shall be heard by the court after notice of hearing. Prior to moving for the entry of a Final Decree, the Proponents shall file a motion for final approval of all monthly statements filed Post Confirmation. Final approval shall be subject to objection by any party and Court review and approval, even if no objections were previously filed. With respect to Professionals retained during the Chapter 11 case, no further applications for retention shall be required, however, any Professionals not previously retained in the Chapter 11 case must file applications for retention and be approved by the Court.

With respect to each Allowed Priority Tax Claim, at the sole option of the Debtor, the holder of an Allowed Priority Tax Claim shall be entitled to receive on account of such Allowed Priority Tax Claim, in full satisfaction, settlement, release and discharge of and in exchange for such Allowed Priority Tax Claim, (a) payment in full in Cash on the Effective Date or (b) such other treatment agreed to by the holder of such Allowed Priority Tax Claim and the Debtor.

C. Treatment of Claims and Interests

The treatment of and consideration to be received by holders of Allowed Claims and the treatment on Interests pursuant to Article 5 of the Plan be in full satisfaction, settlement, release and extinguishment of their respective Allowed Claims against, or Interests in the Debtor and the Debtor's Estate, except as otherwise expressly provided in the Plan of the Confirmation Order.

1. Class 1- Priority Claims

(a) Definition of Class 1- Priority Claims

Priority Claims are all Allowed Claims given priority in payment pursuant to Section 507 of the Bankruptcy Code, but not including Priority Tax Claims and Administrative Claims.

(b) Treatment of Class 1- Priority Claims

Class 1 Claims are Unimpaired. Each Holder of an Allowed Class 1 Claim shall receive, at the option of Proponents, either (A) a Cash payment, in an amount equal to the unpaid amount of the Allowed Class 1 Claim, on the later of: (i) the Effective Date, (ii) the date that is ten (10) Business Days after the date on which such Claim becomes an Allowed Class 1 Claim, after entry of a Final Order or (iii) a date agreed to by the Debtor and the Holder of such Class 1 Claim; or (B) such other treatment on such other terms and conditions as may be agreed upon in writing by the Holder of such Claim and the Proponents or Plan Administrator, or as the Bankruptcy Court has ordered or may order. All

payments and treatment under this section will be made in accordance with the priority provided under the Bankruptcy Code, or as may be otherwise ordered by the Bankruptcy Court.

(c) Voting Status of Class 1- Priority Claims

Class 1 is not Impaired and is deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. Thus, the claimants in Class 1 may not vote on the Plan.

2. Class 2- *Secured Claims*

(a)Definition of Class 2: Secured Claims

Secured Claims consist of all Allowed Secured Claims other than Secured Claims held by Wells Fargo Foothill and Noteholders.

(b)Treatment of Class 2: Secured Claims

Class 2 Claims are Unimpaired. Each Holder of an Allowed Class 2 Claim shall receive, at the option of the Proponents, either (a) retention of liens and receipt of a Cash payment equal to the amount of any Allowed Class 2 Claim, as of the Effective Date, or, if any such Claim becomes Allowed after the Effective Date, as soon as practicable after such Claim becomes Allowed, or (b) the Debtor or Plan Administrator shall abandon the Property that secures any Allowed Class 2 Claim to the Holder of such Claim on or after the later of (i) the Effective Date (or as soon thereafter as is practicable) and (ii) the date that is ten (10)

Business Days after the date on which such Claim becomes an Allowed Class 2 Claim by a Final Order; or (iii) such other treatment as the Proponents and the Holder of any Allowed Class 2 Claim shall have agreed upon in writing.

(c) Voting Status of Class 2: Secured Claims

Class 2 is not Impaired and is deemed to have accepted the Plan pursuant to Section 1126(f) of the Bankruptcy Code. Thus, the claimants in Class 2 may not vote on the Plan.

3. Class 3- General Unsecured Claims

(a)Definitions of Class 3- General Unsecured Claims

Each holder of an Allowed General Unsecured Claim, which means any Pre-Petition Claim (but not an Administrative Claim, Priority Tax Claim, Secured Claim or Priority Non-Tax Claim), including, but not limited to (a) any Claim arising from the rejection of an executor contract or unexpired lease under Section 365 of the Bankruptcy Code, and (b) any deficiency Claim held by the holder of an Allowed Secured Claim.

(b)Treatment of Class 3- General Unsecured Claims

Upon payment in full of Administrative Claims, Priority Claims and Claims in Classes 1 and 2, all remaining proceeds of the Sale and Assets of the Debtor's estate shall be set aside as part of the

Unsecured Fund for payment to creditors holding Allowed General Unsecured Claims.

(a) Voting Status of Class 3- General Unsecured Claims

Class 3 is Impaired and may vote on the Plan.

4. Class 4- Interests

(a) Definition of Class-4 Interests

Interests are any "equity security" interest in any Debtor, as the term is defined in section 101(16) of the Bankruptcy Code, exclusive of any such interests held in treasury by the Debtor in connection with the Chapter 11 Case and/or registered in the stock registers maintained by or on behalf of the Debtor, and as to which Interest no Objection has been made or which Interest has been allowed by a Final Order.

(b) Treatment of Class 4- Interests

Holders of Interests will receive no distributions on account of such holders' Interests, and their equity interests will be canceled as of the Effective Date.

(c) Voting Status of Class 4- Interests

Class 4 is Impaired. However, because the holders of Interests in Class 4 will receive no distribution under the Plan, they are deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. Consequently, holders of Interests in Class 4 may not vote on the Plan.

D. Litigation

On the Effective Date, and except for actions released pursuant to the Global Settlement Agreement or the Plan, the Plan Administrator will be authorized to commence and prosecute any and all Causes of Action that arose before, on or after the Petition Date.

E. Releases

As provided for the in the Global Settlement Agreement, the Plan provides that the Debtor and the Ad Hoc Committee shall release the Creditors' Committee, and each other and their respective members, attorneys and Advisors, and the Creditors' Committee shall release the Debtor and the Ad Hoc Committee, and their members, attorney and advisors, of any and all claims or potential claims that may arise with respect to the Chapter 11 Case. This release provision is not intended to bar or release claims of Creditors or other third parties, if any, against the Debtor, or the attorneys and advisors of the Debtor and the Creditors' Committee.

F. Post-Confirmation Operations of the Debtor

On and after the Confirmation Date, the Debtor shall no longer operate. The Proponents shall engage the Plan Administrator selected by the Creditors' Committee to control the affairs of the Debtor and the Unsecured Fund.

The Plan Administrator selected, subject to Court approval, is William Kaye, who shall assist the

Proponents in the performance of their duties and obligations under the Plan. William Kaye is currently serving as the Committee representative to The Coca-Cola Company, but will resign from the Committee on the Effective Date, and will no longer serve as the representative of The Coca-Cola Company in this case. By way of brief background, William Kaye is the managing Director of JLL Consultants, Inc., through which he acts as a bankruptcy/insolvency consultant in various capacities, primarily in connection with Chapter 11 cases. Mr. Kaye has extensive experience in all business aspects of insolvency and bankruptcy matters, as well as being intimately familiar with the process involved in Chapter 11 cases and post-confirmation wind-down and wind-up activities. Mr. Kaye's experience includes the following recent post-confirmation assignments:

Furr's Restaurant Group, Inc. – US Bankruptcy Court, Dallas, TX. Designated by Official Creditors' Committee as Trustee for the Liquidating Trust created pursuant to the Plan of Liquidation and funded with proceeds of sale of company designated for distribution to unsecured creditors. Responsible for managing and overseeing all aspects of the process necessary to complete prior to making distribution to creditors, including but not limited to claims reconciliation and reduction process, pursuit and collection of Chapter 5 claims, and distribution to creditors.

The Pension Benefit Guaranty Corporation has a substantial claim in this case and Trustee's responsibilities also include ameliorating the claim to the extent possible as it will have a significant impact on distribution to unsecured creditors.

Globe Manufacturing Corp. – US Bankruptcy Court Tuscaloosa, AL. Special Restructuring Officer appointed after completion of sale of substantially all assets pursuant to a Sec. 363 sale during the Chapter 11 Case, charged with liquidating of remaining assets and wind down of the Debtor's corporations. After confirmation of a liquidating plan, continued as Plan Administrator with responsibility for completing claims reconciliation and reduction process, prosecuting pursuit of multimillion dollar tax refunds, collection of open accounts receivables and recovery of deposits with vendors, insurance companies, etc. Worked in coordination with staff of purchaser to insure access to all necessary books and records necessary to complete claims reduction process as well as collection of tax refunds. Disbursed in excess of $15,000,000.

United Artists Theatre Circuit, Inc. – U.S. Bankruptcy Court, Wilmington, DE. Selected by Creditors' Committee as Plan Coordinator under confirmed plan of reorganization with responsibility for prosecuting preference recoveries and potential avoidance actions as well as management and oversight of claims reconciliation and reduction process.

United Petroleum Corp. – US Bankruptcy Court, Miami, FL. Selected as Liquidating Trustee under confirmed plan of liquidation. Responsibilities include liquidation of remaining assets, including sales of assets, collection of refunds from vendors, liquidating of insurance escrow funds against which substantial claims are asserted, reconciliation and reduction of claims, pursuit of potential avoidance claims and distributions to creditors.

Valu Food Inc. – US Bankruptcy Court Baltimore, MD. Estate Representative [a position analogous to a Responsible Person under the US Bankruptcy Code] selected by Creditors' Committee and appointment pursuant to Order of the US Bankruptcy Court. Responsibilities included supervision of liquidation of remaining assets, supervision of claims reduction process, preference recovery demands and actions, with decision-maker as to settlements.

The Plan Administrator will receive compensation in the amount of $10,000 per calendar month for twelve (12) months. In addition, the Plan Administrator shall file monthly statements with the Court of the number of hours expended during such preceding calendar month and a general abbreviated description of the services rendered and serve a copy on the United States Trustee, the Post Confirmation Creditors' Committee and Debtor. The Plan Administrator's hours (multiple by an implied initial billing rate of $350 per hour) may amount to more or less than $10,000; nonetheless, such $10,000 shall be the amount paid each month, subject to the court review described herein for overall reasonableness. The employment is not intended to be on an hourly basis – the Plan Administrator shall keep track of his time merely to provide a benchmark for the fairness of the agreed monthly fee. If no objection is filed to such monthly statements within 10 days service, then such monthly statements will be authorized for payment. Any objections to such monthly statements shall be heard by the Court after notice of hearing. Prior to moving for the entry of a Final Decree, the Plan Administrator shall file a motion for final approval of all monthly statements. Final approval shall be subject to objection by any party and Court review and approval, even if no objections were previously

filed, and shall be subject to a reasonableness standard. If the employment of the Plan Administrator has to be extended beyond twelve months, then the Plan Administrator shall file a motion setting forth the terms of the extension, and the terms of extension shall be subject to objection by the United States Trustee and any Creditor or party interest, and shall be subject to the Court's review and approval, but the compensation of the Plan Administrator shall not exceed $10,000 per month during any such extended term. The Plan Administrator shall also be reimbursed for all reasonable and necessary expenses incurred in connection with performing the services.

The Creditors' Committee may remove or replace the Plan Administrator with or without cause, with the approval of the Bankruptcy Court. The Plan Administrator shall, immediately upon his appointment, have, and may exercise, all authority as the sole corporate responsible person of the Debtor, and shall perform the duties set forth in the Plan through the date the Unsecured Fund is fully disbursed and the Plan Administrator no longer has any ongoing claims in resolution, or when the Plan Administrator resigns, is unable to serve, or is removed, provided that a substitute Plan Administrator may be appointed in such circumstances. The Plan Administrator shall not be required to pursue the collection of any asset that the Plan Administrator, upon consultation with the Creditors' Committee, considers to be of inconsequential value or otherwise not economical to collect. The Plan Administrator shall complete all objections to claims and shall pursue all claims of the Debtor against third parties. If advisable, the Plan Administrator shall pursue all actions that may exist

under chapter 5 of the Bankruptcy Code. Also if advisable, the Plan Administrator shall assert claims, on behalf of the creditors of the Debtor, against the former officers and directors of the Debtor and the related insurance policies. Under the supervision of the Creditors' Committee, the Plan Administrator will be responsible for, and have the power to, to take all steps necessary and helpful to the administration of the Plan.

If the Plan Administrator resigns, is unable to serve, or is removed prior to the date the Debtor is dissolved in accordance with Section 9.11 of the Plan, then an individual to be named by the Creditors' Committee will, upon motion and approval by the Court, be appointed the successor Plan Administrator subject to the foregoing provisions. Further, the Plan Administrator may be removed by the Court for cause (using the same standard as removal of a Chapter 7 Trustee), upon a motion filed by the United States Trustee, any party in interest or by show cause order entered by the Court.

After Confirmation, the Creditor's Committee or Committee shall be the "Post-Confirmation Creditors' Committee." Such committee shall initially be comprised of the members of the Official Committee of Unsecured Creditors' Committee shall no longer be subject to the supervision of the United States Trustee. Vacancies in the Post-Confirmation Creditors' appointed in the Debtor's case. However, the Post-Confirmation Creditors' Committee need not be replaced, unless the number of members falls below three. Vacancies will be filed by the member or members selected by the remaining members of the Post-Confirmation Creditors' Committee itself. The Post-Confirmation Creditors' Committee may adopt

by-laws which may address the manner of selection and appointment of members if vacancies occur.

Upon the Effective Date, all existing Class 4 interests will be canceled. The Debtor shall issue 100 shares of stock from its treasury stock to the Plan Administrator, who will become the sole shareholder of the Debtor as of the Effective Date.

From and after the Confirmation Date, the Debtor will continue in existence until the date of dissolution which shall take place on the Final Distribution Date, as set forth in Section 9.11 of the Plan. The Plan Administrator will have authority to take all actions necessary to: (a) hold, manage, protect, administer, collect, sell, liquidate, prosecute, transfer, resolve, settle, adjust, invest, distribute, or otherwise dispose of any Assets of the Debtor's Estate; (b) reconcile Claims and contest objectionable Claims and Disputed Claims; (c) make all distributions to be funded under the Plan; (d) engage professionals (including those Professionals that presently represent the Debtor and the Creditors' Committee) and any other Persons necessary to assist the Plan Administrator in fulfilling its responsibilities; (e) pay all necessary expenses incurred in connection with the foregoing activities; (f) administer the Plan; (g) file tax returns and make other related corporate filings; (h) transfer Assets; (i) administer the Assets of the Debtor's Estate; (j) amend the certificate of incorporation of the Debtor for the purpose of changing its name; (k) perform the Debtor's obligations under the Assets Purchase Agreement (and documents related thereto); (1) take or omit to take (or ratify) any action pursuant to the Debtor's employee benefit and other plans, including amending or terminating such plans; and (1) undertake such

other responsibilities as are reasonable and appropriate.

On the Effective Date, the Plan Administrator will be authorized to oversee distributions under the Plan and to exercise those remedies available under the Plan. A separate account may be opened by the Debtor/Plan Administrator, which account shall not have a balance in excess of $250,000 at any one time from which payments may be drawn by a single signature (the "Administration Account"). Otherwise, all cash held by the Debtor/Plan Administrator will be placed in an account that requires two signatures for withdrawals, checks, wires and deposits/transfers to the Administration Account. The Creditors' Committee shall designate and approve such two signatories, whom shall not be two individuals at the same company or firm. The Plan Administrator shall post a bond in an amount to be determined by the Creditors' Committee upon pricing of same. Such bond shall be not less than $5 million, and shall be in favor of the General Unsecured Creditors. The United States Trustee shall not set the bond, approve the amount of the bond or surety, and shall have no responsibility to supervise or hold the bond.

Except to the extent otherwise provided under the Plan, the Global Settlement agreement or the Confirmation Order, upon the Effective Date, all Prepetition Date agreements (other than assumed contracts and third party guaranties and indemnities of the Debtor's obligation), credit agreements, Prepetition Date loan documents and Post-Petition Date loan documents to which the Debtor is a party, and all lien claims and other evidence of liens against Debtor, shall be deemed to be canceled and of no further force and effect, without any further action on

the part of the Debtor or the Plan Administrator. The holders of or parties to such cancelled instruments, agreements, securities and other documentation will have no remaining rights arising from or relating to such documents or the cancellation thereof, except the rights provided pursuant to the Plan, the Global Settlement Agreement and the Confirmation Order and any rights that, by the terms of the applicable agreement, survive the termination of such agreement.

The property of the Debtor's Estate will not be revested in the Debtor on or following the Confirmation Date or the Effective Date but will remain property of the Debtor's Estate and continue to be subject to the jurisdiction of the Bankruptcy Court following Confirmation of the plan until distributed holders of Allowed Claims or liquidated with the proceeds being contributed to Available Cash, in accordance with the provisions of the Plan and the Confirmation Order.

Following Confirmation and until its dissolution as set forth in Section 9.11 of the Plan, the Debtor will execute such documents and take such other action as are necessary to effectuate the actions and distributions provided for in the Plan.

Upon the distribution of all Assets of the Debtor's Estate pursuant to the Plan (including the transfer of any amounts held in reserve) and the filing by or on behalf of the Debtor of a Secretary of State to dissolve the Debtor for all purposes effective as of the Final Distribution Date without the necessity for any other or further actions to be taken by or on behalf of the Debtor payments to be made in connection therewith. However the Debtor will file with the

official public office for keeping corporate records in its state of incorporation or organization a certificate of dissolution or equivalent document. Such certificate of dissolution may be executed by the Plan Administrator without need for any action approval by the shareholders, members or Board of Directors of the Debtor. From and after the Effective Date, the Debtor (a) for all purposes will be deemed to have withdrawn business operations from any state in which Debtor was previously conducting, or is registered or licensed to conduct, its business operations, and will not be required to file any document (unless absolutely necessary under the applicable laws of such state), pay any sum or take any other action, in order to effectuate such withdrawal, and (b) will be deemed to have canceled all Interests pursuant to the Plan.

G. Objections to Claims

From and after the Effective Date, the Plan Administrator will have the authority to file, settle, compromise, withdraw, arbitrate or litigate to judgment additional Objections to Claims pursuant to applicable procedures established by the Bankruptcy Code, the Bankruptcy Rules and the Plan. However, the Debtor and its professionals shall continue to prosecute pending Objections to Claims. Except with respect to Administrative Claims and Claims for rejection damages, Objections to Claims must be filed by the Claim Objection Deadline, established by Court Order, as may be extended by the Bankruptcy Court from time to time.

An Objection to the allowance of a Claim will be in writing and may be filed the Bankruptcy Court by the Plan Administrator at any time on or before the

Claim Objection Deadline. The failure by a Proponent to object to and Claim for voting purposes will not be deemed a waiver of the Proponent's right to object to, or re-examine, any such Claim in whole or in part.

H. Distributions Under the Plan

All full or partial payments made by the Plan Administrator and received by the holder of a Claim before the Effective Date pursuant to the Global Settlement Agreement or otherwise will be deemed to be payments under the Plan for Purposes of satisfying the obligations pursuant to the Plan. Subject to Section 9.3 of the Plan, the Plan Administrator will make distributions under the Plan. The Plan Administrator may employ or contract with other entities to assist in or make the distributions required by the Plan. Such employment shall be subject to Court approval during the time period the Bankruptcy Court retains jurisdiction under the Plan. Distributions to any holder of an Allowed Claim will be allocated to the principal portion of any such Allowed Claim, and it is not anticipated in accordance with the priorities established in the Bankruptcy Code unless otherwise provided in the Plan or agreed to with the payee.

Distributions to holders of Allowed Claims will be made: (a) at the addresses set forth in the proofs of Claim filed by such holders; (b) at the addresses set forth in any written notices of address change delivered to the Plan Administrator after the date on which any related proof of Claim was filed; or (c) at the addresses reflected in the Schedules relating to the applicable Allowed Claim if no proof of Claim has been filed and the Plan Administrator has not received a written notice of a change of address.

Cash payments to be made pursuant to the Plan will be made by checks drawn on a domestic bank or by wire transfer from a domestic bank, at the option of the Debtor.

Unless otherwise specifically provided for in the Plan, the Confirmation Order, the Global Settlement Agreement, the Asset Purchase Agreement (or any documents in connection therewith) or required by applicable bankruptcy law, Post-Petition Date interest will not accrue or be paid on Claims (other than Allowed Secured Claims), and no holder of a Claim (other than Allowed Secured Claim) will be entitled to interest accruing on or after the Petition Date on any Claim. Interest will not accrue or be paid upon any Disputed Claim in respect of the period from the Petition Date to the Date a Final Distribution is made thereon if and after such Disputed Claim becomes an Allowed Claim.

Other than in the Final Distribution, no payment of Cash in an amount of less than $50 will be made on account of any Allowed Claim. Such undistributed amount will instead be held in escrow and made as part of the Final Distribution, which will be paid to each creditor with an Allowed Claim, regardless of the amount of each dividend.

Unless otherwise expressly set forth in the Plan with respect to a specific Claim or Class of Claims, for the purpose of the provisions of the Article 11 of the Plan, the "Face Amount" of a Dispute Claims means the amount set forth on the proof of Claim unless the Disputed Claim has been estimated for distribution purposes or, in the alternative, if no proof of Claim has been timely filed or deemed filed, zero.

Checks issued in respect of distributions under the Plan will be null and void if not negotiated within 60 days after the date of issuance. The Plan Administrator will hold any funds returned to the Plan Administrator by reason of non-negotiated checks until such time as they qualify for Unclaimed Property or if earlier, the Plan Administrator receives a request for reissuance. Requests for reissuance of any such check will be made, in writing, directly to the Plan Administrator by the holder of the Allowed Claim with respect to which the check originally was issued. All distributions for which void checks were issued, will be forever barred, as against the Debtor, the Estate and its Assets, however, any Claimants holding Claims for distribution for which void checks were issued may still pursue such Claims for such distributions against Unclaimed Property as set forth in the following paragraph.

All property distributed on account of Claims must be claimed within the later of (a) 90 days after the Initial Distribution Date or (b) 90 days after such distribution is made to the holder or, in the case of a distribution made in the form of a check, must be negotiated or a request for reissuance be made as provided for in the Plan. All Unclaimed Property will be placed into the registry of the Court pursuant to Local Rule 3011-1(B). Nothing contained in the Plan will require the Debtor or the Plan Administrator to attempt to locate any holder of an Allowed Claim other than by reviewing the proofs of Claim and records of the Debtor.

The Plan Administrator will, on the Final Distribution Date, distribute all Available Cash to the holders of Allowed Claims against the Debtor entitled

thereto in accordance with the priorities and restrictions set forth in the Plan ("the "Final Distribution"). Final Distributions will be made after taking into account the distributions each holder of Allowed Claims would have been entitled to receive under Article 5 of the Plan, if all amounts distributed as of such Final Distribution Date were available for distribution by the Plan Administrator on the Effective Date.

To the extent there exists as of the Effective Date Disputed Claims in any Class, the Plan Administrator will reserve from Available Cash an amount equal to the pro rata portion of such distribution to which such Disputed Claim would be entitled if allowed in the amount asserted by the holder of such Disputed Claim, as set forth in the definition of Disputed Claim Reserve. To the extent that any such Disputed Claim becomes an Allowed Claim, such reserved Cash will be distributed to the holder of the Allowed Claim in a manner and amount consistent with the treatment of Allowed Claims in that Class, with any surplus Cash becoming generally available for use in accordance with the terms of the Plan.

All references to Claims and amounts of Claims refer to the amount of the Claim Allowed by operation of law, Final Order of the Bankruptcy Court or the Plan. Accordingly, notwithstanding any other provision in the Plan, no payment or distribution will be made on account of or with respect to any Claim to the extent it is a Disputed Claim, unless and until the Disputed Claim becomes an Allowed Claim. No partial distributions in respect of any Disputed Claim will be made while an Objection is pending to part or all of such Claim.

If any dispute arises as to the identify of a holder of an Allowed Claim who is to receive any distribution, the Plan Administrator may, in lieu of making a distribution to such holder, make the distribution (or any amount estimated pursuant to section 502(c) of the Bankruptcy Code) into a segregated account until the disposition thereof has been determined by Final Order of the Bankruptcy Court or by written agreement among the interested parties to the dispute.

In order to effectuate distributions pursuant to the Plan and avoid undue delay in the administration of the Estate, the Plan Administrator will have the right, at any time, to seek an order of the Bankruptcy Court, after notice and a hearing (which notice may be limited to the holder of such Disputed Claim and which hearing ma, be held on a an expedited basis), estimating a Disputed Claim pursuant to section 502(c) of the Bankruptcy Code, irrespective of whether the Debtor or Plan Administrator has previously objected to such Claim or whether the Bankruptcy Court has ruled on any such Objection. All of these Objection and resolution procedures are cumulative and not necessarily exclusive of one another. In addition to seeking estimation of Claims as provided in Section 11.15 of the Plan, the Plan Administrator may resolve or adjudicate any Disputed Claim in the manner in which the amount of such Claim and the rights of the holder of such Claim would have been resolved or adjudicated if the Chapter 11 Case had not been commenced, subject only to the terms of the Plan and the Global Settlement Agreement. Claims may be subsequently compromised, settled, withdrawn or resolved by the Plan Administrator, pursuant to Section 9.2 of the

Plan and subject to the consent of the Creditor's Committee, as applicable, as set forth under the Plan.

Subject to conditions as set forth in Article 9 of the Plan, the Plan Administrator will have the right (a) to initiate and prosecute any additional Objections to Claims, (b) to request estimation of each such Claims, (c) to litigate any Objection to Final Order, (d) to settle or to compromise any Claim, or (e) to withdraw any Objection to any Claim (other than an Allowed Claim or Claim that is deemed to be allowed pursuant to the Plan or a Final Order).

The distributions and rights provided under the Plan will be in complete satisfaction and release, effective as of the Effective Date, of all Claims against and Interests in the Debtor's Estate and all liens upon any Property of the Estate. The holders of liens satisfied, discharged and released under the Plan will execute and deliver or cause to be executed and delivered, any and all documentation reasonably requested by the Plan Administrator evidencing the satisfaction, discharge and release of such liens.

In connection with the Plan and the distributions made in accordance thereto, to the extent applicable, the Plan Administrator will comply with all tax withholding and reporting requirements imposed on them by any governmental unit and all distributions pursuant to the Plan will be subject to such withholding and reporting requirements. The Plan Administrator will be authorized to take any and all actions that may be necessary or appropriate to comply with such withholding and reporting requirements.

State of Florida, Dept. of Revenue
v. Piccadilly Cafeterias, Inc., Case No. 07-312

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
BROWARD DIVISION

IN RE:
PICCADILLY CAFETERIAS, INC.,
Now known as
CAPITAL CITY
CORNICHON CORP.,

Debtor,
_____/

STATE OF FLOPIDA,
DEPARTMENT OF REVENUE,

Plaintiff, Adv. Pro. No. 04-2310

v.
PICCADILLY CAFETERIAS, INC.,
Now known as CAPITAL CITY,
CORNICHON CORP.,

Defendants.

_____/

CASE NO. 03-27976-BKC-RBR
Chapter 11

COMPLAINT

Comes now, State of Florida, Department of Revenue ("Plaintiff" hereafter), and files this action against Piccadilly Cafeterias, Inc., Now known as

Capital City, Comichon Corp., ("Defendant" hereafter), and states:

JURISDICTION AND PARTIES

1. This adversary proceeding is brought pursuant to Bankruptcy Rule 7001 and 11 U.S.C. § 541, 503, 505, 1146, the State of Florida Department of Revenue is seeking a judgment of this Court for transfer taxes, documentary stamp taxes, and mortgage recording taxes against Piccadilly Cafeterias, Inc., now known as Capital City, Comichon Corp. Directing Defendant to turnover, pursuant to 11 U.S.C. §§ 541, 503, 505, any and all such funds owed by the Defendant to the Plaintiff for sale of Assets prior to confirmed Plan under section 1129.

2. This Court has jurisdiction pursuant to 28 U.S.C. 157 and 1334, this matter is a core proceeding.

3. Plaintiff, the State of Florida Department of Revenue is a creditor and a Governmental entity in the Debtor's Chapter 11.

4. On October 29, 2003, Defendant filed a voluntary petition for relief under Chapter 11.

5. On October 30, 2003, the Debtor filed it's Motion for: 1) Approval Of Sale Of Substantially All of Its Assets Outside the Ordinary Course of Business, Free and Clear Of All Liens, Claims Encumbrances and Interest; and (II) Authorizing and Assignment Of Certain Executory Contracts and Unexpired Leases, (hereinafter "Sale Motion").

6. On February 13, 2004, this Court entered an order approving the Sale Motion; the Court Directed the funds due to the Plaintiff to be placed in escrow.

7. On March 16, 2004, the purchaser closed on the sale of the Debtors Assets pursuant to the Court's Order.

Debtor's Not Due 1146(c) Tax Exemption

8. On or about July 16, 2004, Defendant filed its Disclosure Statement and Plan, scheduling the confirmation hearing for October 21, 2004.

9. On September 9, 2004, Debtor filed another sale motion, selling certain Debtor's assets to Champps Entertainment of Texas, Inc.

10. On September 22, 2004, at hearing the Court directed the parties: the State of Florida Department of Revenue to file an adversary proceeding within thirty days; upon Plaintiff filing said adversary proceeding, the Defendant was required to place sufficient funds in escrow to cover the Plaintiff's claim as a creditor in the Debtor's bankruptcy proceedings.

11. Upon Debtor recording it's documents in the State of Florida, Debtor wrongfully claimed tax exemptions pursuant to 11 U.S.C § 1146(c). See attached copies of Deeds exhibits A, B, C, D.

12. Each of the Debtor's Sales of Assets were conducted prior to the confirmation of the Debtor's Plan, Debtor was not due any tax exemptions.

13. Debtor wrongly claimed and was granted 1146(c) tax exemptions in the State of Florida.

14. "11 U.S.C. §1146 (c) does not apply to transactions that occur prior to the confirmation of a plan under Chapter 11 of the Bankruptcy Code." In re Hechinger Inv. Co. of Delaware, Inc 335 F 3d 243, 246 (C.Al 3 (Del.) 2003. Because the Debtor's case is not confirmed this Debtor is not due any 1146(c) tax exemption.

15. Pursuant to Section 1 146(c):

The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

16. Therefore, the Debtor owes transfer taxes/documentary stamp taxes and mortgage recording taxes to State of Florida, Department of Revenue.

17. To date Defendant has not paid the monies due Plaintiff for transfer taxes/documentary stamps, nor mortgage recording taxes.

18. The State of Florida Department of Revenue hereby demands judgment against Debtor for all monies due to Plaintiff for documentary stamp taxes and mortgage recording taxes.

19. Furthermore, Debtor is not allowed any 1146(c) exemptions prior to a confirmed Plan the State of Florida Department of Revenue demands that all monies the Debtor gains from any exemptions granted in the sale of Debtors assets to Champps Entertainment of Texas, Inc. be placed in escrow and paid to the Plaintiff.

WHEREFORE, Plaintiff demands Judgment against Defendant for the monies (approximately $2000, 000.00), due and owing to Plaintiff for documentary stamp taxes and mortgage recording taxes, plus interest, costs and reasonable attorney fees and further relief as this Court deems just and proper.

Respectfully submitted this 20th day of October, 2004.

I hereby certify that I am admitted to the Bar of the United States District Court for the Southern District of Florida and am accepted from additional

qualifications to practice in this Court by Local Rule 2090-1 (B)(2)(b) pertaining to Government Attorneys.

BY:_____

Dahlia A. Williams Paul
Assistant General Counsel
Florida Department of Revenue
6565 Taft Street, Suite 400
Hollywood, Florida 33024-4044
Telephone: (954) 967-1080
Telecopier: (954) 967-1084
Florida Bar No.: 0167606

Consideration: 1,825,000

PREPARED BY
Edith R. Perez, Esq.
Latham & Watkins LLP
633 W. Fifth St., Ste. 4000
Los Angeles, California 90071

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RETURN TO:
First American Title Ins. Co.
25400 US 19 N, Suite 135
Clearwater, FL 33763

SPECIAL WARRANTY DEED

THIS INDENTURE, made, this 16th day of March, 2004, between PICCADILLY CAFETERIAS, INC, a Louisiana corporation, as debtor and debtor-in-possession, whose mailing address is: 3232 South Sherwood Forest Boulevard, Baton Rouge, Louisiana 70816, hereinafter referred to as the GRANTOR, to PICCADILLY RESTAURANTS, LLC, a Delaware limited liability company, whose mailing address is: 3232 South Sherwood Forest Boulevard, Baton Rouge, Louisiana 70816, hereinafter referred to as the GRANTEE,

WITNESSETH, that the said GRANTOR, for and in consideration of the sum of One Million Eight Hundred Twenty Five Thousand and No/100

DOLLARS ($1,825,000), to it in hand paid by GRANTEE, receipt whereof is hereby acknowledged, has granted, bargained and sold to the said GRANTEE forever, the following described land together with improvements thereon situated, lying and being in the County of Broward, State of Florida, to wit:
See Exhibit A attached hereto and by this reference made a part hereof
Parcel Identification Number: 48-43-07-39-001 and 49-41-03-29-001

TOGETHER WITH all the tenements, hereditaments and appurtenances belonging or in any way appertaining thereto (collectively, the "Property")

TO HAVE AND TO HOLD the Property, together with all and singular the rights and appurtenances thereto in anywise belonging unto the GRANTEE or GRANTEE'S successors and assigns forever, and GRANTOR does hereby bind GRANTOR and GRANTOR'S successors and assigns to WARRANT AND FOREVER DEFEND, all and singular the Property unto GRANTEE and GRANTEE'S successors and assigns, against every person whomsoever lawfully claiming, or to claim the same, or any party thereof, by, through or under the GRANTOR, but not otherwise.

This conveyance is made and accepted subject to any and all liens, easements, restrictions, covenants and conditions of record.

Exempt from Documentary Transfer Tax, pursuant to the Order of the United States Bankruptcy County for the Southern District of Florida, Case No. 03-27976-BKC-RBR(signatures on the next page)

IN WITNESS WHEREOF, the said GRANTOR has signed and sealed these presents the-day and year first above written.

PICCADILLY CAFETERIAS, INC,
a Louisiana corporation, as Debtor and
Debtor-in-Possession

BY: _____
John G. McGregor
Chief Executive Officer

Signed, Sealed and Delivered in Our Presence.

_____
Witness Signature

_____
Type or Print Witness Name

_____
Witness Signature

_____
Type or Print Witness Name

STATE OF FLORIDA

COUNTY OF DADE

The foregoing instrument was acknowledged before me this 16 day of March, 2004 by John G. McGregor as CEO for Piccadilly Cafeterias. He/she/they is/are personally known to me or has/have produced _____ as identification.

_____
Notary Public

_____

Type or Print Name of Officer
Taking Acknowledgement

Notary Expiration _____
Notary Seal

LEGAL DESCRIPTION

THE LAND REFERRED TO HEREIN IS SITUATED IN THE CITY OF TAMARAC, COUNTY OF BROWARD, STATE OF FLORIDA, AND IS DESCRIBED AS FOLLOWS

PARCEL B:
TRACT 2: (Broward County - Tamarac):

Parcel A, PICCADILLY CAFETERIA according, to the plat thereof as recorded in Plat - Book 115, Page 37, Public Records of Broward County, Florida.

State of Florida, Dept. of Revenue
v. Piccadilly Cafeterias, Inc., Case No. 07-312

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
www.flsb.uscourts.gov

In re: Chapter 11
Case

PICCADILLY Case No. 03-27976-BKC-RBR
CAFETERIAS,
INC., now known as
CAPITAL CITY CORNICHON
CORP.,

Debtor.
_____/

ORDER (I) CONFIRMING AMENDED JOINT CHAPTER 11 PLAN OF LIQUIDATION PROPOSED BY PICCADILLY CAFETERIA, INC., NOW KNOWN AS CITY CORNICHON CORP., AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS, AS MODIFIED AND (II) SETTING POST-CONFIRMATION STATUS CONFERENCE

THIS MATTER came before the Court on October 21, 2004 at 9:30 a.m. to consider confirmation of the *Amended Joint Chapter 11 Plan of Liquidation Proposed by Piccadilly Cafeterias, Inc., now known as Capital City Cornichon Corp., and The Official Committee of Unsecured Creditors, as modified by the*

Modification to Amended Joint Chapter 11 Plan dated October 19, 2004 (collectively, the "Plan")[1] proposed by Piccadilly Cafeterias, Inc., now known as Capital City Cornichon Corp., and The Official Committee of Unsecured Creditors (collectively, the "Proponents").

In connection with the confirmation of the Plan, the Court reviewed and considered: (i) the *Certificate of Plan Proponents on Acceptance of Plan, Report on Amount to Be Deposited, Certificate of Amount Deposited And Payment of Fees* (the "Ballot Certificate"); and (ii) the Declaration of Vince J. Colistra in Support of Confirmation of the Plan (the "Confirmation Affidavit"). The Court has also: (i) reviewed and considered the entire record in this case, including the Disclosure Statement and the Plan; (ii) reviewed the United States Trustee's request to dismiss or convert this case to Chapter 7, which has been subsequently withdrawn, as set forth in the *Objections of United States Trustee to Proposed Disclosure Statement and Plan, and Motion to Dismiss or Convert this Case to Chapter 7* (C.P. No. 618) (the "Motion to Dismiss or Convert"); (iii) reviewed the objections to confirmation of the Plan filed by the Florida Department of Revenue (C.P. No. 964); Harris County/City of Houston, Houston Independent School District, Jefferson County, and McLennan County (C.P. No. 947) and Clear Creek Independent School District and Clear Lake City Water Authority (C.P. No. 946) (collectively, the "Objections"); (iv) considered argument of counsel; (v) considered the testimony of Vincent J. Colistra as set forth in the Confirmation Affidavit which was admitted into evidence at the Confirmation Hearing

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[1] Unless otherwise defined herein, all capitalized terms used in this Order shall have the meanings ascribed to them in the Plan.

without objection; and (vi) considered the evidence presented at the hearing.

I. FINDINGS OF FACT/CONCLUSIONS OF LAW

Based upon the above and otherwise being fully advised in the premises, the Court hereby makes the following findings of fact and conclusions of law pursuant to Rule 7052(a) of the Federal Rules of Bankruptcy Procedure:[2]

A. The Court conducted a hearing on July 16, 2004, to consider approval of the Disclosure Statement filed by the Proponents, as amended (the "Disclosure Statement").

B. There was adequate and sufficient notice of: (i) the Plan and the Disclosure Statement; (ii) the deadline to file and serve objections to the confirmation of the Plan and to the adequacy of the Disclosure Statement; (iii) the deadline for voting on the Plan; and (iv) the hearing date on the approval of the Disclosure Statement and Confirmation of the Plan. The Proponents have afforded all parties in interest with an adequate opportunity to be heard regarding the Disclosure Statement and the Plan. The Plan and Disclosure Statement were served upon all parties entitled to vote thereon.

C. The Court has jurisdiction over this matter pursuant to 11 U.S.C. §§ 105, 1121 through 1129; 28 U.S.C. §§ 157(a), (b)(1) and (b)(2)(L), 1334(a) and (b),

---

[2] Where appropriate, findings of fact shall constitute conclusions of law and conclusions of law shall constitute findings of fact. See, *In re Grand Union Co.*, 2000 Bankr. LEXIS 1710 (Bankr. N.J. 2000) and *In re American Family Enterprises*, 256 B.R. 377 (Bankr. N.J. 2000).

the United States District Court's general order of reference, and other various applicable provisions of the Bankruptcy Code and Bankruptcy Rules;

D. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409(a);

E. In accordance with section 1122(a) of the Bankruptcy Code, Articles 3, 4 and 5 of the Plan classify and place each Claim against and Interest in the Debtor together with other Claims against or Interests in the Debtor, as applicable, that are substantially similar to such Claims or Interests, and, accordingly, satisfies section 1122(a) of the Bankruptcy Code;

F. The Plan adequately and properly classifies all Claims and Interests required to be classified, and, accordingly, satisfies section 1123(a)(1) of the Bankruptcy Code;

G. Articles 4 and 5 of the Plan specify any class of Claims or Interests that are impaired or unimpaired under the Plan, and accordingly, satisfies section 1123(a)(2) and (3) of the Bankruptcy Code;

H. The Plan provides the same treatment for each Claim or Interest in each Class unless the holder of such a Claim or Interest agrees to less favorable treatment, and accordingly, satisfies section 1123(a)(4) of the Bankruptcy Code;

I. Article 9 of the Plan sets forth the means by which the Plan will be implemented, and accordingly, makes adequate means for its implementation and satisfies section 1123(a)(5) of the Bankruptcy Code;

J. Each of the Voting Classes have accepted the Plan in the requisite number of ballots, and in the requisite dollar amount, as required pursuant to 11 U.S.C §§ 1126(c) and as set forth in the Ballot Certificate;

K. The Ballot Certificate validly and correctly sets forth the tabulation of votes, as required by the

Bankruptcy Code, Bankruptcy Rules, the Local Rules and the Order Setting Hearing on Confirmation;

L. The Plan was voted on by all Classes of Impaired Claims that were entitled to vote pursuant to the Bankruptcy Code, the Bankruptcy Rules and the Order Setting Hearing on Disclosure Statement and Confirmation;

M. The Ballot Certificate reflects that Class 3 accepted the Plan.

N. Classes 1 and 2 are unimpaired under the Plan and therefore are deemed to have accepted the Plan pursuant to Section 1126(f) of the Bankruptcy Code;

O. The Plan complies with all applicable provisions of 11 U.S.C. §§ 101 *et seq.*, including 11 U.S.C. §§ 1129(a) and (b) with respect to all Classes of Claims and Interests under the Plan, and, as required by Bankruptcy Rule 3016(a), the Plan is dated and identifies the Debtor and the Committee as the Proponents.

P. The Proponents of the Plan complied with all applicable provisions of 11 U.S.C. §§ 101 *et seq.*, including 11 U.S.C. §§ 1129;

Q. The Plan has been proposed and submitted to all creditors and equity security holders in good faith and not by any means forbidden by law and therefore the provisions of 11 U.S.C. §§ 1129(a)(3) is satisfied;

R. The Proponents of the Plan have disclosed the identity of the officers and directors of the Reorganized Debtor and therefore the Plan satisfies the requirements of 11 U.S.C. §§ 1129(a)(5).

S. The Plan does not discriminate unfairly, is fair and equitable and otherwise complies with all of the provisions of Section 1129(b) of the Bankruptcy Code with respect to each Class of Claims or Interests that are impaired under the Plan, including without limitation, Classes 3, and 4;

T. The Plan provides for the liquidation of all of the Debtor's assets and therefore the provisions of 11 U.S.C. § 1129(a)(11) are not relevant;

U. The Debtor has sufficient funds available to pay, or enable it to reserve in fall, for the payment of (i) Allowed Administrative Expense Claims (unclassified); (ii) United States Trustee's Fees (unclassified); (iii) Secured Claims; and (iv) Priority Claims (Class 1). The Proponents will also make a pro rata distribution to the holders of Allowed General Unsecured Claims (Class 3). The Proponents estimate that Class 3 creditors will receive a distribution of approximately 40 - 45%.

THEREFORE, BASED UPON THE FOREGOING FINDINGS, IT IS ORDERED AS FOLLOWS:

1. The Plan is **CONFIRMED**;

2. The Motion to Dismiss or Convert is hereby denied, and the Objections are hereby overruled.

3. The findings of fact and conclusions of law set forth above shall constitute the findings of fact and conclusions of law of this Court pursuant to Bankruptcy Rule 7052. To the extent any finding of fact later shall be determined to be a conclusion of law, it shall be so deemed, and to the extent any conclusion of law later shall be determined to be a finding of fact, it shall be so deemed. (See Footnote 3, supra);

4. Without objection, as of the Effective Date, Soneet Kapila is appointed as the Plan Administrator. The Plan Administrator will perform the duties set forth in the Plan in accordance with Section 9.1 of the Plan. The engagement and appointment of Soneet Kapila as the Plan Administrator is consistent with, and in the best interest of the Debtor, the estate, the

creditors, equity security holders and with public policy;

5. From and after the date of this Order, the Debtor will continue in existence until dissolution as set forth in Section 9.2 of the Plan;

6. Except as otherwise provided in the Plan, the Plan Administrator has the authority, on behalf of the Debtor, and without further approval from this Court, to take all actions necessary to perform the duties set forth in the Plan. The Plan Administrator shall confer with and report to Post-Confirmation Creditors' Committee in accordance with the Plan;

7. Upon the Effective Date and without further action of this Court or the Board of the Debtor, all of the directors of the Debtor who have not previously resigned shall be deemed to have resigned and all officers of the Debtor shall be deemed to have been terminated without cause;

8. On the Effective Date, the Plan Administrator is authorized to exercise any powers specifically granted under Article 9 of the Plan, oversee distributions under the Plan and to exercise those remedies available to such entities under the Plan;

9. The Plan Administrator shall file an Omnibus Application to Retain any Professionals retained during the Chapter 11 Case with such applications setting forth the specific duties to be performed by such Professional. Any Professionals not previously retained in the Chapter 11 Case must file applications for retention and be approved by the Court. Notwithstanding the filing of any supplemental post-confirmation fee applications, the fees awarded at the Confirmation Hearing and the Orders thereon shall be deemed final fee applications. The post-Confirmation fees and costs of Professionals retained by the Plan Administrator shall be considered by the

Court in manner provided in Section 2.3 (b) of the Plan;

10. The Plan Administrator will act in a fiduciary capacity for the interests of all holders of Claims and thereafter for the Holders of Interests in accordance with the Plan;

11. The property of the Debtor's Estate is not revested in the Debtor on or following the entry of this Order or the Effective Date but will remain property of the Debtor's Estate and continue to be subject to the jurisdiction of this Court following the entry of this Order until distributed to holders of Allowed Claims or liquidated with the proceeds being contributed to Available Cash, in accordance with the provisions of the Plan and this Order;

12. Following the entry of this Order and until dissolution as set forth in Section 9.11 of the Plan, the Debtor shall execute such documents and take such other action as are necessary to effectuate the transactions provided for in the Plan. Section 9.14 of the Plan is modified to provide that: "Pursuant to section 1146(c) of the Bankruptcy Code, the issuance, transfer or exchange of any security or the making or delivery of an instrument of transfer under this Plan may not be taxed under any law imposing a stamp tax or similar tax. Any sale of any Asset occurring before, after or upon the Effective Date (including the sale) shall be deemed to be in furtherance of this Plan.

13. All full or partial payments made by the Debtor and received by the holder of a Claim before the Effective Date shall be deemed to be payments under this Plan for purposes of satisfying the obligations of the Debtor pursuant to this Plan. Distributions shall be made by the Plan Administrator as provided in Article 11 of the Plan;

14. The Plan will be funded by (a) Cash of the Debtor on the Effective Date, (b) funds added to Cash

of the Debtor after the Effective Date from, among other things, the liquidation of the Debtor's remaining Assets and the prosecution and enforcement of preserved Claims and Causes of Action, and (c) the release of any funds held in reserve in accordance with the terms thereof;

15. The Plan Administrator is authorized to establish one or more interest-bearing accounts as it determines may be necessary or appropriate to effectuate the Provisions of the Plan consistent with section 345 of the Bankruptcy Code and any orders of this Court;

16. Notwithstanding anything to the contrary in the Bankruptcy Rules providing for earlier closure of the Chapter 11 Cases, when all Disputed Claims against the Debtor have become Allowed Claims or Allowed Interests or Disallowed Claims or Disallowed Interests, and all remaining Assets of the Debtor have been liquidated and converted into Available Cash (other than those Assets abandoned by the Debtor or Plan Administrator), and such Available Cash has been distributed in accordance with the Plan, or at such earlier time as the Plan Administrator deems appropriate, the Plan Administrator will seek authority from this Court to close the Chapter 11 Case in accordance with the Bankruptcy Code and the Bankruptcy Rules; contemporaneous with, or prior to the filing of the Motion for Final Decree, all Professionals retained by the Plan Administrator from and after the Confirmation Date shall file and serve a motion disclosing all professional fees and costs awarded to each Professional. The Court will conduct a hearing on the motion at which time it will consider all prior awards of Post-Confirmation Compensation on a final basis. The Plan Administrator shall serve until such time as the entry of a Final Decree closing the Chapter Case, at which

time the Plan Administrator shall be discharged of his duties.

17. Confirmation of the Plan is in the best interests of the Debtor, all creditors, all holders of Interests and all other parties in interest;

18. The Plan Administrator is hereby granted all of the rights and powers of a debtor-in-possession under Sections 1107 and 1108 of the Bankruptcy Code and, in accordance with Section 1123(b)(3)(B), is designated and shall serve as the representative of the Debtor's Estate for purposes including, but not limited to: (i) prosecution of Causes of Action pursuant to the Plan; and (ii) distributions to be made under the Plan;

19. The Plan Administrator shall be compensated in the manner set forth in Section 9.1 of the Plan;

20. The Debtor is authorized, empowered and directed to enter into, and to perform the obligations under the Plan and to take such actions as are necessary to effectuate the terms of the Plan and this Order, including without limitation, executing and/or entering into any and all additional instruments and documents that may be necessary or desirable to implement the terms of the Plan and this Order;

21. Unless otherwise provided herein, all injunctions or stays provided for in the Chapter 11 Case pursuant to section 105 or 362 of the Bankruptcy Code, or otherwise, and in existence on the Confirmation Date, will remain in full force and effect until the Final Distribution Date;

22. The stays provided by Bankruptcy Rules 6004(g) and 6006(d) are hereby lifted;

23. The Debtor shall pay the U.S. Trustee the appropriate sum required pursuant to 28 U.S.C. § 1930(a)(6), within ten (10) days of the entry of this Order, for the pre-confirmation period and post confirmation period relating to those Disbursements

not made by the Plan Administrator. The Debtor shall simultaneously provide to the U.S. Trustee an appropriate Affidavit indicating cash disbursements for all relevant periods;

24. Notwithstanding anything contained in the Plan to the contrary, the Plan Administrator shall further pay the U.S. Trustee the appropriate sum required pursuant to 28 U.S.C. § 1930(a)(6) for post-confirmation periods, based upon all post-confirmation disbursements made by the Plan Administrator, within the time periods set forth in 28 U.S.C. § 1930(a)(6), until the earlier of the closing of these Chapter 11 Case by the issuance of a Final Order by this Court dismissing this Chapter 11 Case or converting this Chapter 11 Case to another chapter under the Bankruptcy Code, and the Plan Administrator shall provide to the U.S. Trustee upon payment of each post-confirmation payment an appropriate affidavit indicating all cash disbursements for the relevant period;

25. Until the Effective Date, the Court retains jurisdiction over the Debtor, its Assets and its Estate. Thereafter, the jurisdiction of the Court over the Debtor, its Assets and its Estate is limited to the subject matters set forth in Article 18 of the Plan;

II. POST-CONFIRMATION STATUS CONFERENCE

26. The Court will conduct a post-confirmation status conference on Wednesday, Dec. 8, 2004 at 9:30 a.m., in Courtroom 308, U.S. Bankruptcy Court, 299 E. Broward Blvd., Fort Lauderdale, Florida, to determine (i) whether the Debtor and the Plan Administrator have complied with the provisions of this Order.

27. The record of the Confirmation Hearing is closed.

ORDERED in the Southern District of Florida on October 27, 2004.

RAYMOND B. RAY
UNITED STATES BANKRUPTCY
JUDGE

Copy furnished upon;

Jordi Guso, Esq.
Berger Singerman, P.A.
200 S. Biscayne Boulevard
Suite 1000
Miami, FL 33131

(Attorney Guso is directed to mail a conformed copy of this Order upon all interested parties and to file a certificate of service).

Request for Payment of Department of Revenue Taxes

(Bankruptcy Code Cases - Administrative Claims)
DEPARTMENT OF REVENUE/STATE OF FLORIDA

AMENDED

BAM 04
R. 07/01

United States District Court for the SOUTHERN/MIAMI
District of FLORIDA

Bankruptcy No.	03-27978
Type of Bankruptcy Proceeding	11
Date of Petition	10/29/03
Tax Number	72-0804977
Social Security Number	
Employer Identification Number	

PICCADILLY CAFETERIAS INC

3232 SHERWOOD FOREST BLVD
BATON ROUGE LA 70816-0000

1. The undersigned, whose business address is Post Office Box 6668, Tallahassee, Florida 32314-6668, is the agent of the agent of the Department of Revenue, and is authorized to make this claim on behalf of the State of Florida.
2. Request is made for payment of taxes and any interest or penalty due the Department of Revenue, State of Florida, as shown below.
3. The grounds for the liability to for taxes, interest and penalty due under the Revenue Laws of the State of Florida.

ADMINISTRATIVE CLAIMS - CODE s. 503

Kind of Tax	Tax Due	Accrued Interest To Date	Accrued Penalty To Date	Balance Due
DOCUMENTARY STAMPS	39200.00	0.00	0.00	39200.00

Total amount due as of date of this request	$	39,200.00
Dollar amount per day at which interest will accrue after this request	$	12.88
Returned Item Check Fee	$	.00

Claimant reserves the right to amend if claim is based on estimated amounts of tax due or is otherwise subject to more accurate determination.

Penalty for Presenting Fraudulent Claim - Fine of not more than $5,000 or imprisonment for not more than 5 years or both - Title 18, U.S.C., Sec. 152	Signature	Date 11/30/04
	Title DEBRA PILGRIM TAX SPECIALIST I	Phone (850) 921-2151

JPERCEDES CLAIM $2,000,000.00 DATED 5-12-04

Fee Attached Summary Sheet

CLAIMANTS ATTORNEY
DAHLIA PAUL
6565 TAFT STREET 4TH FLOOR
HOLLYWOOD, FL 33024-4000

Legal Claims Summary Sheet
Administrative Claims

AMENDED DR-668 FL 07/01

☐ New Case ☒ Prior Case — Case Code

Taxpayer's Name: PICCADILLY CAFETERIAS INC	Location of Court: SOUTHERN/MIAMI FLORIDA
Business Name:	Bankruptcy Case Number: 03-27976
Address: 3232 SHERWOOD FOREST BLVD	Chapter Number: 11 — Petition Date: 10/29/03
City: BATON ROUGE — State: LA — Zip Code: 70816-0000 — Account Number: 72-0604877	
Tax Type: DOCUMENTARY STAMPS	Date Business Close/Date Converted:

Period Due	Tax Amount	Tax Type	Tax Account	Adm/Court Fees	Penalty	Interest	Returned Check Original Number
03/04	39200.00	Bill			0.00	0.00	

TOTAL: TAX: $ 39,200.00 PENALTY: $ 0.00 INTEREST: $ 0.00

Court Costs/Sheriff's Fee $ 0.00
Returned Check Fee $ 0.00
Total of Claim: $ 39,200.00
Daily Interest 12.88

PAUL STEVEN SINGERMAN, ESQ
200 S BISCAYNE BLVD #1000
MIAMI FL 33131-
(305) 755-9500

Date Prepared 11/30/04 Prepared By: DP P & I Figured to 11/30/04

IMPORTANT NOTICE
POST PETITION TAXES
(TAX BECOMING DUE AFTER FILING BANKRUPTCY)

To: Debtor & Debtor's Attorney

From: Department of Revenue

Re: Electronic Funds Transfer (EFT)

It is the responsibility of the trustee, debtor-in-possession, or debtor in a Chapter 13 case, to file all returns and pay all taxes due after the bankruptcy petition date. It is most important to recognize that the responsibility includes remitting taxes through Electronic Funds Transfer (EFT). Should a new bank account be established, as required in all Chapter 11 cases, a new EFT account will need to be established. Information regarding the EFT system may be obtained from the Department of Revenue's EFT Section at (850) 487-7972 or 1-800-352-3671.

Payments not made as required by EFT will be deemed late causing additional penalties and interest to be added to your account. Please use the EFT system after the bankruptcy filing to avoid unnecessary hardship.

PETITIONER'S BRIEF

582962
7
47pgs
No. 07-312
FILED
JAN 22 2008
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Petitioner,

v.

PICCADILLY CAFETERIAS, INC.,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF PETITIONER

FREDERICK F. RUDZIK
ASSISTANT GENERAL COUNSEL
DEPARTMENT OF REVENUE
STATE OF FLORIDA
P. O. BOX 6668
TALLAHASSEE, FL 32314
(850) 410-2600

BILL MCCOLLUM
ATTORNEY GENERAL
SCOTT D. MAKAR*
SOLICITOR GENERAL
CRAIG D. FEISER
DEPUTY SOLICITOR GENERAL
STATE OF FLORIDA
OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399
(850) 414-3300
(850) 410-2672 (FAX)

Counsel for the Petitioner
* COUNSEL OF RECORD

January 22, 2008

QUESTION PRESENTED

Whether 11 U.S.C. § 1146(c) of the Bankruptcy Code, which exempts from stamp or similar taxes any asset transfer "under a plan confirmed under section 1129 of the Code," applies to transfers of assets occurring prior to the actual confirmation of such a plan?

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 24.1, petitioner states that all parties to the proceedings in the court whose judgment is sought to be reviewed are listed in the caption.

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OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at *In re Piccadilly Cafeterias, Inc.*, 484 F.3d 1299 (11th Cir. 2007), and is reproduced in the Petition Appendix ("Pet. App.") at 1a-9a. The final summary judgment and opinion of the bankruptcy court granting summary judgment in favor of respondent Piccadilly are unreported and are reproduced at Pet. App. 31a-41a. The opinion of the district court affirming the bankruptcy court is unreported and is reproduced at Pet. App. 10a-30a.

JURISDICTION

The judgment of the Eleventh Circuit was entered on April 18, 2007. Pet. App. 1a. This Court granted the petition for writ of certiorari on December 7, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

11 U.S.C. § 1146(a) (previously 1146(c)) of the Bankruptcy Code, entitled "Special Tax Provisions" and which is reproduced in the petition appendix, states:

> (a) The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

See Pet. App. 42a.

STATEMENT OF THE CASE

Section 1146(c) (now 1146(a))[1] of the Bankruptcy Code allows debtors in bankruptcy to avoid the imposition of "stamp" or other "similar" taxes on transfers of their property if done "under a plan confirmed" pursuant to Chapter 11 of the Code, which relates to reorganizations. This statutory authority provides a means of avoiding the imposition of such taxes, provided the asset transfers are "under a plan confirmed" by a bankruptcy court.

In this case, no dispute exists that the State of Florida's taxes under Chapter 201, Florida Statutes, are "stamp" or "similar" taxes and that such taxes are applicable to the transfer of property at issue. Nor does any dispute exist that the transfer was not sought under section 1129, which sets forth the requirements for confirmation of a plan under Chapter 11, whose proceedings are designed to allow debtors and creditors to work together to from a plan of reorganization that is mutually beneficial. Instead, it is undisputed that the approval for the transfer of the property was sought under section 363(b)(1) of the Bankruptcy Code, which provides for the sale of assets outside of the ordinary course of business. Moreover, no dispute exists that no plan of confirmation under Chapter 11 had even been proposed at the time of the transfers and that a

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[1] Newly renumbered section 1146(a) is referred to herein as section 1146(c), the section number that was in effect during the litigation of this case. No changes were made in the language of the section when it was renumbered in 2005. Pet. App. 42a.

confirmed plan did not exist until over eight months later.

Under these facts, the tax exemption authorized under section 1146(c) is not available because these types of pre-confirmation transfers cannot be said to be "under a plan confirmed" within the plain meaning of section 1146(c). The Third and Fourth Circuits have applied the plain meaning of this phrase, finding that it sets a clear, objective, and easily-applied chronological bright line that precludes tax exemptions for transfers made prior to confirmation of a plan under Chapter 11. *In re Hechinger Inv. Co. of Delaware, Inc.*, 335 F.3d 243, 246-47 (3d Cir. 2003); *In re NVR, LP*, 189 F.3d 442, 447 (4th Cir. 1999).

In this case the Eleventh Circuit, however, takes a much broader view, holding that section 1146(c)'s tax exemption is available to transfers occurring prior to a plan even being proposed, let alone confirmed, so long as they are later determined after-the-fact to be "necessary" in some statutorily undefined way to the ultimate "consummation" of a confirmed plan. *Piccadilly Cafeterias*, 484 F.3d at 1304-05. That broad reading conflicts with the natural meaning of 1146(c), encourages debtors to sell their property pre-confirmation under section 363 of the Bankruptcy Code and then liquidate their assets under Chapter 11 (rather than Chapter 7) in order to gain the tax exemption. It also creates needless additional litigation over what transfers are deemed "necessary." Section 1146(c), properly read, exempts from stamp taxes only those transfers made under the authority of a confirmed plan as discussed herein.

A. History of Section 1146(c).

Section 1146(c)'s origin is traced to section 77(B)(f) of the Bankruptcy Act amendments of 1934, which modified the Bankruptcy Act of 1898. Section 77(B)(f) exempted "the issuance, transfers, or exchanges of securities or making or delivery of conveyances to make effective any plan of reorganization confirmed under the provisions of this section" from federal stamp taxes. *See* 11 U.S.C. § 267(f) (repealed 1938). Four years later, Congress amended the Act by expanding the exemption to *state* and federal taxes on securities or transfers under a confirmed chapter X plan. *See* 11 U.S.C. § 667 (1938, repealed 1978); *see also In re New York, N.H. & H.R. Co.*, 95 F.2d 483 (2d Cir. 1938). The exemption was again expanded in 1978 to embrace "any law imposing a stamp tax *or similar tax.*" (emphasis added). *See* H.R. Rep. No. 595, 95th Cong, 1st Sess. 281 (1977).

The statute provides that the "issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax." 11 U.S.C. § 1146(c). Other than altering the statutory references to the confirmation provisions, this language has not been materially altered since 1938. Congress has made major revisions to the Bankruptcy Code in 1938, 1978, 1984, and 2005. Despite having the opportunity to amend the language of section 1146(c) in 2005, Congress readopted section 1146(c) and renumbered it as section 1146(a).

B. Florida's Documentary Stamp Tax

Florida, like most States, imposes a tax on "deeds, instruments, or writings whereby any lands, tenements, or other real property, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to, or vested in" a purchaser or other transferee. Fla. Stat. § 201.02(1) (2007). The amount of the tax is 70 cents "on each $100 of the consideration" for the property, and the tax is required to be paid "prior to recordation" of the instrument. *Id.*; Fla. Stat. § 201.01(1). The Bankruptcy Code does not define the term "stamp tax or similar tax" as used in section 1146(c), though courts have set forth standards.[2] Respondent "does not dispute that in the absence of the section 1146 exemption, [Petitioner] would be entitled to the disputed taxes." District Court's Order of June 23, 2006 n.11, Pet. App. 14a.

C. Piccadilly's Bankruptcy Proceedings.

On October 28, 2003, Respondent Piccadilly Cafeterias, Inc. ("Piccadilly") executed an asset purchase agreement with Piccadilly Acquisition Corporation ("PAC"). PAC agreed to purchase all of

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[2] The Second Circuit in *995 Fifth Ave. Assocs., L.P. v. New York State Department of Taxation & Finance*, 963 F.2d 503, 512 (2d Cir. 1992), held that the "essential characteristics" of a "stamp tax or similar tax" are: (i) the tax is imposed only at the time of transfer; (ii) the tax is determined by the fair market or par value of the item transferred; (iii) the tax rate is "a relatively small percentage" of that value, "typically about one percent or less"; (iv) the tax is imposed regardless of any gain or loss realized by the transferor; and (v) "in the case of state documentary transfer taxes, the tax must be paid as a prerequisite to recording."

Piccadilly's assets for $54 million. One day later, on October 29, 2003, Piccadilly filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code.

At the same time, Piccadilly also filed a motion pursuant to 11 U.S.C. § 363(b)(1), requesting authorization to sell substantially all of its assets outside of the ordinary course of business. Piccadilly also requested an exemption from stamp taxes on the asset sale pursuant to 11 U.S.C. § 1146(c). The Florida Department of Revenue ("Department") objected to both of Piccadilly's requests.

On December 4, 2003, upon request by Piccadilly, the bankruptcy court approved an auction through which the highest bidder would be entitled to purchase Piccadilly's assets. The winning bid of $80 million was from Piccadilly Investments, Inc., which had no relationship to PAC. On January 26, 2004, Piccadilly and a committee of senior secured note holders, along with a committee of unsecured creditors, entered into a global settlement, setting the priority of distribution among Piccadilly's creditors.

On February 13, 2004, the bankruptcy court approved the sale of Piccadilly's assets to Piccadilly Investments and approved the global settlement. The court further held that the $80 million sale to Piccadilly Investments was exempt from stamp taxes under 11 U.S.C. § 1146(c), even though the sale was made: (i) prior to the global settlement or its approval, (ii) prior to the proposal of any plan, and (iii) pursuant to the court's authority to approve sales of estate assets under section 363 (versus its authority under section 1129 to confirm a plan). The Department moved to reconsider, vacate and/or amend the sale order. The motion was denied by the bankruptcy

court. The sale of Piccadilly's assets closed on March 16, 2004.

Piccadilly did not file a plan of liquidation in Chapter 11 until March 26, 2004. More than four months later, on July 31, 2004, it filed an amended plan. Those plans did not provide for any form of reorganization of Piccadilly or the continuation of Piccadilly's business, but merely provided for distribution of Piccadilly's assets in accordance with the terms of the global settlement. The Department then commenced an adversary proceeding, and filed an objection to the plan along with a complaint against Piccadilly seeking a declaration that its pre-confirmation stamp taxes in the amount of $32,200 were not exempt under 11 U.S.C. § 1146(c). The bankruptcy court confirmed the amended plan on October 21, 2004. The court denied the Department's motion to reconsider the confirmation order. The Department then amended its complaint against Piccadilly, and both parties filed motions for summary judgment on the issue of stamp taxes and the application of section 1146(c).

D. Proceedings Below.

1. *The Bankruptcy and District Courts.* The bankruptcy court, and the district court on appeal, both held that section 1146(c) should be read to allow a tax exemption for pre-confirmation transfers. The bankruptcy court held a hearing and ruled in favor of Piccadilly on summary judgment, holding that the pre-confirmation asset sale was exempt from stamp taxes pursuant to 11 U.S.C. § 1146(c). According to the bankruptcy court, even though the transfer was completed before a plan was even proposed, much less confirmed, the sale of substantially all of Piccadilly's

assets was nonetheless a transfer "under a plan confirmed under section 1129." Pet. App. 40a. The bankruptcy court determined that "the sale was necessary to consummate the Plan." Pet. App. 40a-41a. The district court affirmed the bankruptcy court's conclusion that the exemption can apply even when a transfer is completed and subject to tax at a time when no plan has been proposed or confirmed.[3] Pet. App. 28a-29a.

2. *The Eleventh Circuit.* The court of appeals affirmed, agreeing with the district court that pre-confirmation transfers may constitute transfers "under a plan confirmed" pursuant to 11 U.S.C. § 1146(c). *Piccadilly Cafeterias,* 484 F.3d at 1304.

After acknowledging that the precise issue was one of first impression in the Eleventh Circuit, the court expressly disagreed with the decisions of the Third and Fourth Circuits in *Hechinger* and *NVR*, respectively, both of which held that the exemption in section 1146(c) may *not* apply to pre-confirmation transfers of assets, such as the one in this case. Instead, the court sided with the statutory interpretation found in a "somewhat similar" Eleventh Circuit case, as well as the reasoning of the Second Circuit in an "analogous" case involving section 1146(c), both of which held that the language "under a plan" refers to any transfers that are deemed

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[3] The district court focused solely on whether pre-confirmation transfers are eligible for tax exemptions under section 1146(c); it did not decide the issue of whether the specific pre-confirmation sale of Piccadilly's assets was necessary to consummate the plan ultimately confirmed. Pet. App.28a-29a.

"necessary to the consummation of a confirmed Chapter 11 plan."[4] *Id.*

In this case, the Eleventh Circuit went even further. It held that the language "under a plan confirmed" is not bound by any temporal limitation. Instead, section 1146(c)'s tax exemption may apply to *all* "pre-confirmation transfers that are necessary to the consummation" of an ultimately confirmed plan of reorganization. *Id.* In other words, as long as a Chapter 11 plan is confirmed at some point in the future, and the pre-confirmation transfer later is deemed "necessary to the consummation" of that eventually confirmed plan, the Eleventh Circuit held that it does not matter that the plan *did not even exist* at the time of the transfer. As long as the pre-confirmation transfer is deemed necessary after-the-fact, it may be considered as occurring "under" the later confirmed plan for purposes of the statute's stamp tax exemption.[5]

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[4] The two cases the Eleventh Circuit relied on, *In re T.H. Orlando Ltd.*, 391 F.3d 1287 (11th Cir. 2004), and *In re Jacoby-Bender*, 758 F.2d 840 (2d Cir. 1985), are distinguishable from those of the Third and Fourth Circuits (and this case) because they involved post-confirmation transfers.

[5] Like the district court, the Eleventh Circuit addressed only the general issue of whether pre-confirmation transfers are ever eligible for the tax exemption in section 1146(c). 484 F.3d at 1304-05 n.5. It was not presented with the issue of whether, assuming pre-confirmation transfers are eligible, the specific pre-confirmation transfer at issue was "necessary for consummation" of the confirmed plan. *Id.*

SUMMARY OF ARGUMENT

The Eleventh Circuit erred in its broad interpretation of section 1146(c) of the Bankruptcy Code. By its plain language, section 1146(c) only exempts from stamp or similar taxes any asset transfer "under a plan confirmed under section 1129" of the Code. Transfers that occur prior to plan confirmation are ineligible for this favorable tax treatment.

Under its plain meaning and basic principles of statutory construction, section 1146(c) only permits tax exemptions for transfers made under the authority of a confirmed plan. The statute's plain meaning precludes a bankruptcy court from retroactively approving tax exemptions for asset transfers that occurred months or years before a plan's actual confirmation. The Eleventh Circuit went beyond section 1146(c)'s proper scope, concluding that the statute's tax exemption applies to transfers occurring before a plan is even proposed.

By removing any requirement that a plan actually be confirmed or even proposed at the time of the transfer, the Eleventh Circuit expanded the tax exemption in such a boundless way that it can apply to virtually any transaction in a bankruptcy proceeding, regardless of when it occurred. This holding is justified by neither the statute's language nor this Court's principles of statutory construction, which require a narrow and limiting construction of tax statutes. The statutory requirement that there be "a plan confirmed" becomes of little consequence, so long as a bankruptcy court eventually confirms a plan and determines after-the-fact that pre-confirmation transfers are "necessary" for the plan's

"consummation" – a concept the Eleventh Circuit simply engrafted into the statute.

In addition, the Eleventh Circuit essentially disregarded the principle that tax statutes must be construed narrowly but, instead, allowed general principles of flexibility to trump the plain language of section 1146(c). Its ruling ensures that the issue of whether a pre-confirmation transfer is ultimately determined after-the-fact to be "necessary" to a confirmed plan's "consummation" will be subject to substantial litigation and uncertainty. Its ruling also places undue burdens on the administration of state and local tax systems, which are deprived of tax revenues and forced to unravel tax exemptions granted liberally under the Eleventh Circuit's misconstruction of section 1146(c).

Notably, Congress has had the opportunity to alter or expand the clear language of section 1146(c), but has opted not to do so. Congress revised the Bankruptcy Code in 2005, *after* the Third and Fourth Circuits had issued their decisions narrowly interpreting section 1146(c). Congress only renumbered section 1146(c) as 1146(a), leaving the statute's language unchanged thereby supporting the interpretations of the only two appellate courts to have addressed the precise issue presented.

Neither the plain language of section 1146(c) nor any principles of statutory construction or policy support the Eleventh Circuit's decision, which is impractical in operation and impedes the sound functioning of the bankruptcy and tax systems. This Court should therefore reverse the Eleventh Circuit and hold that the tax exemption in section 1146(c) does not apply to pre-confirmation transfers.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 1146(c) REQUIRES THAT FEDERAL COURTS LIMIT EXEMPTIONS FROM STATE AND LOCAL STAMP OR SIMILAR TAXES TO ONLY THOSE POST-CONFIRMATION TRANSFERS MADE UNDER THE AUTHORITY OF A CONFIRMED PLAN.

The Eleventh Circuit's broad interpretation of section 1146(c) is at odds with the plain language of that provision, which is naturally read to require that a reorganization plan under Chapter 11 must first be proposed and confirmed, and that only those transfers that flow from and occur after the plan's confirmation are entitled to tax exemptions from state and local stamp and similar taxes. That is the plain and ordinary reading of the language as a whole in section 1146(c), which this Court should adopt for the reasons that follow.

A. Section 1146(c)'s Plain Meaning Provides for Tax Exemptions Only for Transfers Authorized by Confirmed Plans.

The statutory text forms the "starting point" for determining what Congress intended in section 1146(c). *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). Indeed, this Court has long held that the paramount principle of statutory construction is a statute's plain language, which bears a strong presumption of congressional intent. *See Ardestani v.*

I.N.S., 502 U.S. 129, 135-36 (1991).[6] Indeed, the strong presumption that a statute's plain language expresses congressional intent "is rebutted only in 'rare and exceptional circumstances, ... when a contrary legislative intent is clearly expressed." *Id.* at 135-36 (citation omitted).

Plain language principles have primacy in the bankruptcy context, where this Court with some frequency reviews statutes whose language is challenged as ambiguous or inconsistent with the general principle that bankruptcy laws should be given flexibility to achieve their remedial purpose. *See, e.g., Lamie*, 540 U.S. at 536 ("We should prefer the plain meaning since that approach respects the words of Congress."). Yet, it has been noted time and again that a party seeking to defeat the plain and ordinary meaning of a portion of the Bankruptcy Code bears an "exceptionally heavy burden" in doing so. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 9 (2000) (burden on party is "exceptionally heavy" to overcome the most natural reading of bankruptcy code provision) (citing *Patterson v. Shumate,* 504 U.S. 753, 760 (1992)); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 552 (1994)) (same); *see also Rubin v. United States*, 449 U.S. 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.'") (citations

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[6] *See also Thompson v. United States*, 246 U.S. 547, 551 (1918) ("The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture."); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed...").

omitted). Where the meaning of statutory language is plain, the "sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Hartford Underwriters*, 530 U.S. at 6 (quoting *Caminetti*, 242 U.S. at 485) (internal quotes removed). Judicial analysis starts "with the understanding that Congress 'says in a statute what it means and means in a statute what it says there.'" *Id.* (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

Under its plain language, the stamp tax exemption set forth in section 1146(c) flows from an orderly sequence of events, which are reflected in the verb tenses and the ordinary meaning of the words used in that section: a confirmed reorganization plan must first exist from which authorized property transfers are then made to which the statutory tax exemption then becomes applicable. This temporal sequence of events flows naturally and logically from the plain, ordinary, and natural reading of section 1146(c) as a whole. To be made, the transfers must be authorized under a plan that has been confirmed.

This temporal dimension inherent in section 1146(c) is reflected in a number of ways, including the wording of the statute and the tenses used. *See United States v. Wilson*, 503 U.S. 329 (1992) ("Congress' use of a verb tense is significant in construing statutes."). In section 1146(c), the word "confirmed" modifies the word "plan" and is a past participle, meaning "a verb form indicating past or completed action or time that is used as a verbal adjective in phrases such as *baked beans* and *finished work[.]*" *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) *available* at http://www.bartleby.com/61/47/P0104700.html (last

visited January 22, 2008) (emphasis in original); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1653 (1981) ("a participle that typically expresses completed action ..."). Where a past participle is placed after the noun it modifies, e.g., "beans baked in the oven," or "work finished after midnight," the past participle still indicates past or completed action. Here, the phrase "plan confirmed" connotes a "confirmed plan" meaning one that has already been confirmed in the past.

Given that section 1146(c) speaks in terms of a past confirmed plan, the use of the word "under" in the phrase "under a plan confirmed" must be read in its ordinary sense and in context. *See Ardestani*, 502 U.S. at 135 ("The word "under" has many dictionary definitions and must draw its meaning from its context."). The most natural and plain reading of "under" in this context comports with its standard dictionary definition, which is "with the authorization of" or to be "inferior or subordinate" to its referent, here the confirmed plan. *See Hechinger*, 335 F.3d at 252-54 (citing Random House Dictionary for "under" as "authorized" by);[7] *NVR*, 189 F.3d at 457 (citing

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[7] The Third Circuit concluded that the "most natural reading" of "under a plan confirmed" is "authorized" by such a plan, stating:

> When an action is said to be taken "under" a provision of law or a document having legal effect, what is generally meant is that the action is "authorized" by the provision of law or legal document. Thus, if a claim is asserted "under" 42 U.S.C. § 1983, Section 1983 provides the authority for the claim. If a motion is made "under" Fed.R.Civ.P. 12(b)(6), that rule provides the authority for the motion. If benefits are paid "under" a pension or welfare plan, the payments are authorized by the plan.

335 F.3d at 252.

Black's Legal Dictionary for "under" as "inferior" or "subordinate" and Webster's II New Riverside University Dictionary as "with the authorization of");[8] *see also* THE NEW SHORTER OXFORD ENGLISH DICTIONARY, 3469 (1993) ("Subject to the authority, control, direction, or guidance of"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2487 (1981) ("required by: in accordance with: bound by").

As this Court recognized in *Ardestani*, a range of dictionary meanings exist for the word "under" and, while creative and potentially plausible alternative readings may exist, its core meaning when referring to something being "under" a statute includes "subject to" or "governed by" as well as "by reason of the authority of." 502 U.S. at 135 (citing *St. Louis Fuel and Supply Co., Inc. v. F.E.R.C.*, 890 F.2d 446, 450 (D.C. Cir. 1989)). Given the context of section 1146(c), which requires that its tax exemption be "under" laws imposing a stamp or similar tax and that transfers must be "under" a confirmed plan "under" Chapter 11, the plain and ordinary meaning of "under" (i.e., "under the authority of") makes good sense. All three references to "under" in section 1146(c) should be read consistent with one another under the "normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning[.]" *C.I.R. v. Keystone Consol. Industries., Inc.*, 508 U.S. 152, 159 (1993); (citing *Sorenson v. Sec. of Treasury*, 475 U.S. 851, 860 (1986)). This canon has even greater weight given

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[8] The Fourth Circuit stated: "Logically reading these definitions in the context of § 1146(c), we cannot say that a transfer made prior to the date of plan confirmation could be subordinate to, or authorized by, something that did not exist at the date of transfer-a plan confirmed by the court." 189 F.3d at 457.

that section 1126(c) uses the word "under" three times in the same sentence. *Hechinger*, 335 F.3d at 253. Moreover, this interpretation of "under a plan confirmed" gives it the same meaning as the identical phrase used in section 365(g) of the Bankruptcy Code, which regards executory contracts and unexpired leases "under a plan confirmed under chapter 9, 11, 12, or 13 of this title." 11 U.S.C. § 365(g). *See Hechinger*, 335 F.3d at 254 ("It seems clear that this language means a plan that is confirmed pursuant to the authority conferred by those chapters.").[9]

Read in this light,[10] section 1146(c) provides that the "transfer" at issue must be "*under the authority of* a plan confirmed *under the authority of* section 1129 of this title" and that such transfers "may not be taxed *under the authority of* any law imposing a stamp tax or similar tax."[11] Plainly and

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[9] *See also* 11 U.S.C. § 524 (relating to "willful failure of a creditor to credit payments received under a plan confirmed under this title...") & 11 U.S.C. § 1231 (identical to section 1146(c) in Chapter 12 context). These are the only other references to "under a plan confirmed" in the Code.

[10] Notably, neither the Eleventh Circuit nor the dissent in *Hechinger* reach a conclusion of what definition of "under" to accept. The Eleventh Circuit found section 1146(c) ambiguous and refused to read it to preclude pre-confirmation transfers. *Piccadilly Cafeterias*, 484 F.3d at 1304. The dissent in *Hechinger* decides what "under" "does *not* mean[,]" 335 F.3d at 258, but does not decide what it does mean, though inferring that "in accordance with" might be acceptable. *Id.*

[11] Congress obviously may simply use the word "under" to convey this meaning, and need not insert the phrase "the authority of" into the Code in a cumbersome way. As noted in *Hechinger*, "[i]n some contexts, the mere word 'under' may be sufficient to convey this meaning, whereas in others an explicit reference to the concept of legal authority may be necessary." 335 F.3d at 253 n.3.

symmetrically reading "under" in this way, a transfer must be under the authority of a plan that has been confirmed under the authority of a plan that meets section 1129's requirements. *Keystone Consol. Industries, Inc.*, 508 U.S. at 159 ("the Code must be given 'as great an internal symmetry and consistency as its words permit.'") (citation omitted).

It cannot be fairly said that a transfer made prior to the date of plan confirmation (or prior to a plan even being proposed, as is the case here) can be under the authority of, or governed or subject to, a plan that did not even exist at the time of the transfer.[12] To do so creates a fiction that unnecessarily injects uncertainty and burdens into the administration of state and local stamp taxes (as discussed below).

In contrast, section 1146(c)'s plain language results in the most reasonable interpretation, which creates a bright and common sense line that makes the tax exemption self-executing: eligible transfers must be authorized under and thereby flow from a confirmed plan. Under its plain language, section 1146(c) entitles debtors to relief from stamp and similar taxes imposed *at the time of transfer* to facilitate the implementation of an already confirmed reorganization plan thereby preventing federal interference with state taxation system before a debtor reaches the point of plan confirmation. As the Fourth Circuit concluded:

> Congress, by its plain language, intended to provide exemptions only to those

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[12] Nor can it be said to be "subordinate" or "inferior" to a nonexistent plan. *See NVR*, 189 F.3d at 457.

> transfers reviewed and confirmed by the court. Congress struck a most reasonable balance. If a debtor is able to develop a Chapter 11 reorganization and obtain confirmation, then the debtor is to be afforded relief from certain taxation to facilitate the implementation of the reorganization plan. Before a debtor reaches this point, however, the state and local tax systems may not be subjected to federal interference.

NVR, 189 F.3d at 458. The contrary view would allow debtors an unlimited ability to obtain the exemption for months or years before a plan is proposed or confirmed, and unduly burden and complicate the administration of state and local stamp tax system. It would also read the necessity of a confirmed plan out of the statute because the tax exemption could be obtained without a debtor having even proposed a plan.

Moreover, the plain meaning of "under" and the grammatical tense of the word "confirmed" lead to the natural reading of a temporal restriction in section 1146(c) without the need for Congress to have expressly done so. The plain and natural reading of section 1146(c), that transfers must be made on the authority of a confirmed plan, forecloses the need for an explicit limitation. *See Hechinger*, 335 F.3d at 256. Transfers made under the authority of a confirmed plan will necessarily come chronologically after such a plan is confirmed thereby making the addition of further temporal language unnecessary or redundant.

Further, this temporal restriction is reinforced by a plain reading of the phrase that a transfer under

a confirmed plan "*may not be taxed* under any law imposing a stamp tax or similar tax." (Emphasis added). Under the Code, the phrase "may not" is defined as "*prohibitive*, and not permissive." 11 U.S.C. § 102(4) (emphasis added). Thus, the phrase "may not be taxed" in section 1146(c) must be read to mean "shall not be taxed" or "must not be taxed." This "prohibitive" use of "may not" buttresses the plain meaning of section 1146(c). *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'") (citations omitted). This prohibitive language, in effect, creates a tax exemption *at the time of the transfer*, not at some later time when a federal court may determine that a pre-confirmation transfer is somehow deemed to be "necessary" to the "consummation" of a plan already confirmed.

Pre-confirmation transfers do not fit this definition because they were taxable events at the time of transfer. Stamp and other transfer taxes generally become due and payable at the time of transfer or its recordation, such that any exemption must exist and be implemented at that point in time in order to meet the literal requirements of section 1146(c). *See, e.g.*, Fla. Stat. § 201.01(1). The view that pre-confirmation transfers are not taxable events subject to stamp or similar taxes, but are merely subject to a possible tax exemption under a plan that has been neither proposed nor confirmed, turns section 1146(c)'s otherwise plain meaning, and the concept of its prohibitive tax exemption, on their collective heads.

Moreover, the language of section 1146(c) provides no support for the notion that Congress intended to grant tax exemptions for any and all

property transfers that happen to occur during the course of a bankruptcy proceeding. Had it intended to do so, it would have used different language that made clear that any property transferred, whether pre-confirmation or post-confirmation, was entitled to a tax exemption. For instance, Congress could have enacted a statute stating that any property transfer under section 363 of the Code (such as the transfer at issue) shall not be taxed under stamp and similar transaction taxes. But Congress chose prohibitively to limit tax exemptions to only those property transfers that flow from a confirmed plan under section 1129, a reading of section 1146(c)'s plain language that also happens to make common sense.

B. The Eleventh Circuit Ignored Section 1146(c)'s Plain Meaning, Rewriting the Statute to Say It Applies to Any Transfers Later Determined to be Necessary for the Consummation of a Confirmed Plan.

The Eleventh Circuit, in concluding that section 1146(c) applies to pre-confirmation transfers, was required to essentially rewrite the statute. This point is evident in its conclusion that courts applying the Eleventh Circuit's holding are now required to determine after-the-fact whether a pre-confirmation transfer was "necessary to the consummation of a confirmed plan of reorganization, which, at the very least, requires that there be some nexus between the pre-confirmation transfer and the confirmed plan." *Piccadilly Cafeterias*, 484 F.3d at 1304. This reading of section 1146(c) is an expansive one, extending its language beyond transfers authorized under *confirmed* plans to *any* transfers that are later deemed "necessary to the *consummation* of a

confirmed plan" – a far broader concept than the plain language of the statute supports.

Had Congress intended this expansive and manipulable interpretation of the scope of the stamp tax exemption it could have written section 1146(c) to say: "Any ~~The~~ issuance, transfer, or exchange of a security, or the making or delivery of ~~an~~ any instrument of transfer made prior to a plan's confirmation and later deemed necessary to the consummation of ~~under~~ a plan confirmed under section 1129 of this title, may be exempt ~~may not be taxed~~ under any law imposing a stamp tax or similar tax, provided some nexus exists between the pre-confirmation transfer and the confirmed plan." It did not, and the Eleventh Circuit's judicial gloss on the plain language of the statute drastically transforms its meaning. *See Lamie*, 540 U.S. at 538 (rejecting an interpretation that reads "an absent word" into a statute and enlarges its application).

Section 1146(c) speaks only in terms of tax exemptions that are allowed for transfers that flow from "confirmed" plans. Once a confirmed plan exists, a question may naturally arise (particularly if the plan has not been written clearly or in a detailed way) whether a particular proposed transfer to be accomplished is "necessary" for "consummation" of that confirmed plan and thereby "may not be taxed." That is precisely what occurred in *In re Jacoby-Bender*, 758 F.2d 840 (2d Cir. 1985), upon which the Eleventh Circuit erroneously relied.

In *Jacoby-Bender*, the Second Circuit addressed whether a transfer made *after* confirmation of a plan, but not specifically referred to in the approved plan, could still be considered "under a plan confirmed" as

required by section 1146(c). *See id.* at 841. The only issue was what degree of specificity was needed in the confirmed plan itself to conclude that a particular transfer was made under its authority. Under this distinguishable fact pattern, the Second Circuit concluded that a specific transfer of assets takes place "under a plan confirmed" as long as the transfer "is necessary to the *consummation* of a plan." *Id.* at 842 (emphasis added).[13]

The Eleventh Circuit's misreading of section 1146(c) erroneously injects the concept of "consummation" and equates it with "confirmation" thereby leading to much mischief. Confirmation and consummation are two distinct concepts. What is "necessary" for "confirmation" of a proposed Chapter 11 plan is set forth in section 1129; what is necessary for "consummation" of a confirmed plan is a far different question and focuses on the legitimate scope of transfers flowing from the confirmed plan itself.

In rejecting the contention that *Jacoby-Bender*'s "necessary for consummation" principle applied to pre-confirmation transfers, the Fourth Circuit in *NVR* stated:

> Depending on the type and size of debtor at issue and the complexity of the reorganization, a reorganization plan

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[13] Nothing in the Second Circuit's opinion addresses or even suggests that a transfer *prior to confirmation* would have been covered. In fact, the bankruptcy court previously *denied* the debtor's effort to obtain an earlier ruling on the application of section 1146(c) to the potential sale when the plan had not yet been confirmed. *See In re Jacoby-Bender, Inc.*, 34 B.R. 60, 62 (Bankr. S.D.N.Y. 1983).

> might well be worded either in specific terms identifying each and every transfer or in much broader language that generally outlines the activities that must occur to consummate the plan. We do not take issue with the Second Circuit's logic as it was applied in *Jacoby-Bender* because it was employed to interpret a *plan* – i.e., to *identify which transfers* were necessary to, and thus contemplated by, "a plan confirmed."

189 F.3d at 456 (emphasis in original). The court noted, however, that lower courts[14] began to extend *Jacoby-Bender*'s language and alter its holding, "changing the test from 'necessary to the consummation of a plan,' to 'necessary to the confirmation of a plan.'" *Id.* This approach is severely flawed because the "fundamental difference between the consummation of a plan is the timing of the events within the bankruptcy process. Consummation or execution of a reorganization plan cannot take place until the bankruptcy court first confirms a plan." *Id.*; *see also Hechinger*, 335 F.3d at 255 (*Jacoby-Bender* "resolved the issue of whether the sale was authorized by the terms of the *previously confirmed plan*, not whether the sale was necessary to achieving the plan's confirmation.") (emphasis added).

For these reasons, the Eleventh Circuit's engrafting of new language into section 1146(c) is erroneous and unsupported by that section's text. *See*

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[14] *See, e.g., In re Lopez Dev., Inc.*, 154 B.R. 607, 609 (Bankr. S.D. Fla. 1993); *In re Permar Provisions, Inc.*, 79 B.R. 530, 534 (Bankr. E.D.N.Y. 1987); *In re Smoss Enter. Corp.*, 54 B.R. 950, 951 (Bankr. E.D.N.Y. 1985).

Lamie, 540 U.S. at 538 (no need to go beyond "a plain, nonabsurd meaning" of statute).

C. Other Principles of Statutory Interpretation Support Reading Section 1146(c) as Providing Tax Exemptions Only for Transfers Authorized by Confirmed Plans.

The plain language approach as applied to section 1146(c) is further supported by fundamental principles of statutory interpretation used in the bankruptcy and taxation contexts.

First, the relevant language of section 1146(c) related to "under a plan confirmed" has not changed since 1978. Since that time, Congress has had the opportunity to amend the language when it enacted revisions to the Bankruptcy Code in 1984 and 2005. Regarding the latter, Congress in 2005 enacted the Bankruptcy Abuse Prevention and Consumer Protection Act. In doing so, it simply readopted section 1146(c) verbatim and renumbered it as section 1146(a).

This 2005 revision of the Code occurred *after* both the Fourth Circuit's 1999 decision in *NVR* and the Third Circuit's 2003 decision in *Hechinger*, each holding that section 1146(c)'s tax exemption does not apply to pre-confirmation transfers. Rather than legislatively overruling the decisions of the Fourth and Third Circuits, which were the only circuits that directly addressed pre-confirmation transfers,[15]

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[15] At that time, it appeared that the Eleventh Circuit in *T.H. Orlando* had adopted the interpretation of section 1146(c) set forth in *NVR* and *Hechinger*, thereby reflecting unanimity (Continued ...)

Congress merely readopted and renumbered section 1146(c) as section 1146(a). This lack of change to section 1146(c)'s statutory language is evidence of the correctness of these decisions. In *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978), this Court stated that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." (citations omitted).[16]

Second, this Court has held that courts should "proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed." *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 851-52 (1989) (citation and quotation marks omitted). As such, tax exemptions are to be "unambiguously proved" by the party seeking the exemption. *See United States v. Centennial Savings Bank FSB*, 499 U.S. 573, 583 (1991); *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988); *C.I.R. v. Jacobson*, 336 U.S. 28, 49 (1949).

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among three circuit courts. *See In re T.H. Orlando Ltd.*, 391 F.3d 1287, 1291(11th Cir. 2004) (agreeing with "our sister circuits' interpretation of § 1146(c).") The Eleventh Circuit below, however, held that its discussion on this issue in *T.H. Orlando* "does not square" with the "strict temporal interpretation" of those cases and did not reach a conclusion on whether section 1146(c) may apply to pre-confirmation transfers. *Piccadilly Cafeterias*, 484 F.3d at 1303 n.2.

[16] *See also Thompson*, 246 U.S. at 551 (it is presumed that Congress, when it enacts a statute, had full knowledge of judicial decisions germane to the statute's subject matter); *Caminetti*, 242 U.S. at 487-88 (reasoning that Congress was presumed to know previous meaning given to a statutory term when enacting a new law using that term).

Given this admonition, section 1146(c)'s language must be construed strictly and narrowly in favor of the states to prevent unwarranted displacement of state tax laws. *See Nat'l Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582, 590 (1995) (discussing principles of comity in taxation and the "federal reluctance to interfere with state taxation" given the "strong background presumption against interference."). Congress must use "plain words" if it intends to prevent state taxation; courts will not conclude an exemption is intended based on "dubious inferences." *Oklahoma Tax Comm'n v. U.S.*, 319 U.S. 598, 607 (1943). Such exemptions are not to be implied when not explicitly granted. *See Wells Fargo Bank*, 485 U.S. at 354.

Here, no federal interest exists in construing section 1146(c)'s limited tax exemption beyond the narrow context of the statute's plain language. Its scope is limited to only stamp or similar taxes imposed on certain transfers that arise under the authority of a confirmed plan under Chapter 11. Its scope does not extend to transfers authorized under other portions of the Bankruptcy Code, such as section 363, which formed the basis for the transfer below. Nor does it extend to transfers other than those arising in the Chapter 11 context (such as Chapter 7 liquidations). Instead, the limited scope of section 1146(c) merely relieves a debtor who has obtained a confirmed plan under section 1129 from paying such taxes on those limited transfers authorized under the plan. No federal interest exists in implying any broader tax relief, which would conscript tax revenues from the states for no apparent purpose.

A similar presumption exists against federal interference with the administration of a state's taxation scheme. *See, e.g., Nat'l Private Truck Council,* 515 U.S. at 586 & 590 ("We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration."). For this reason, tax statutes must be narrowly construed in favor of the state to avoid this interference. *See id.; see also Wells Fargo*, 485 U.S. at 354. The effect of the Eleventh Circuit's ruling is to directly interfere with the administration of Florida's documentary stamp tax structure, which imposes the tax on the transfer and requires that the tax be paid "prior to recordation" of the instrument of transfer. By extending the tax exemption to transfers that occurred months or years earlier at a time when no confirmed plan existed (or was even proposed), states are placed in the position of having to "unravel" or "undo" the taxes imposed in each of these situations. This additional administrative burden may require rebates from the state treasury for taxes paid, the escrowing of tax funds to be held contingent upon the possible future proposal or confirmation of a plan, or any number of other possible methods of implementing after-the-fact tax exemptions.

The plain meaning of section 1146(c) respects and gives force to these important principles of statutory construction by avoiding the potential morass that flows from a broad versus strict construction of the statute. The Eleventh Circuit all but ignored these principles in expanding section 1146(c)'s application. By broadening the statute's application to include pre-confirmation transfers that occurred without the authority of a confirmed (or proposed) plan, the Eleventh Circuit displaces and

disrupts the state's taxation system to a greater extent than the language of section 1146(c) supports thereby providing another reason for rejection of the Eleventh Circuit's approach.

Finally, the title of the subchapter in which section 1146(c) is placed is "POST-CONFIRMATION MATTERS." This placement has at least some meaning, and cannot be dismissed as entirely irrelevant. Indeed, the general principle is that, while not dispositive, the placement of a provision in a particular subchapter provides general support for its terms being interpreted consistent with that subchapter. *See, e.g., Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). While it might be argued that some provisions in the subchapter have been misplaced, the more persuasive position is that Congress intended to grant tax exemptions to *post-confirmation* transfers flowing from a confirmed plan.

D. Review of Section 1146(c)'s Legislative History Is Unnecessary and Sheds Little Light.

Given the plain meaning of section 1146(c), it is unnecessary to review its legislative history. *See Lamie*, 540 U.S. at 539. In any event, its legislative history is exceptionally sparse and sheds little light such that this Court should "rest [its] holding on the statutory text." *Id.* at 542.

The 1934 legislation, section 77B(f) of the Bankruptcy Act, exempted the debtor from payment

of federal stamp taxes on new securities issued pursuant to a plan of reorganization that required the debtor to modify the terms of outstanding securities for which the federal stamp tax had already been paid. *See* S. Rep. No. 482, 73d Cong. 2d Sess. 4 (1934). The 1934 exemption applied only to specified federal stamp taxes, which were themselves repealed by the Excise Tax Reduction Act of 1965, Pub. L. 89-44, § 401(b), 79 Stat. 148 (1965), effective January 1, 1968. The 1938 legislation enacted as section 267 of the Chandler Act of 1938, expanded the exemption to "any stamp taxes now or hereafter imposed." *See* Chandler Act of 1938, ch. 575, § 267, 52 Stat. 840, 902-903 (1938) (repealed in 1979).

None of the available legislative history explains the legislative purpose for the extension of the exemption from federal to federal and state stamp taxes in 1938 or from stamp taxes to stamp "and similar" taxes in 1978. At best, Congress merely intended to broaden the scope of these taxes.[17] None of the legislative history addresses the issue presented in this case. Thus, any inference that Congress intended to create tax exemptions for property transfers occurring after a bankruptcy case is commenced but before a plan is confirmed or even proposed, must be divined from the statutory language itself. As this Court has noted, the lack of

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[17] *See, e.g., 995 Fifth Ave. Assocs.*, 963 F.2d at 510 n.2 (holding that New York "gains tax" of 10% on profit from sale of real estate was not "stamp tax or similar tax" exempted under § 1146(c); expansion of exemption in 1978 to "similar taxes" should not "be read broadly to accord greater tax relief for debtors" as stated by district court; legislative history of 1978 amendment is "a simple declaration that the new provision, § 1146(c), enlarges the former exemption under § 267 to include taxes similar to stamp taxes").

"*any* conclusive statement in the legislative history" supporting a meaning of the word "under" lends support for concluding that its ordinary meaning must prevail. *Ardestani*, 502 U.S. at 136-37 (emphasis in original). Given the absence of any legislative history on the issue presented, this Court must rely on the plain language of section 1146(c) as supported by established principles of statutory construction.

II. THE ELEVENTH CIRCUIT'S DECISION IS IMPRACTICAL AND CREATES MISCHIEF IN THE ADMINISTRATION OF EXEMPTIONS FROM STATE AND LOCAL STAMP TAXES.

The Eleventh Circuit's interpretation is impractical for a number of reasons. It creates an unwieldy judicial test, increases the potential for "creative" and unjustified tax exemptions, unduly burdens state and local tax officials who must now guard against or "unravel" newfound and unwarranted exemptions, and provides a windfall where Chapter 11 is used for liquidation rather than reorganization. In contrast to the elegance and simplicity of section 1146(c)'s plain meaning, the Eleventh Circuit's interpretation "would itself lead to results that seem undesirable as a matter of policy." *Hartford Underwriters*, 530 U.S. at 12.

First, the Eleventh Circuit's interpretation of section 1146(c) creates a new test unmoored from the statute's plain language. By engrafting a "necessary" for the "consummation" of a plan requirement, the court strains the statutory language and injects a new judicial inquiry: whether pre-confirmation transfers are now in hindsight deemed "necessary" for the "consummation" of the plan ultimately confirmed and

whether "some nexus between the pre-confirmation transfer and the confirmed plan" now exists. *Piccadilly Cafeterias*, 484 F.3d at 1304. The Eleventh Circuit's interpretive test puts the collection of such taxes in a litigation limbo that may not be resolved for months or years after deeds are recorded and tax exemptions later unraveled or undone. Allowing a pre-confirmation transfer to qualify for a tax exemption at the time of transfer, premised on the transfer possibly being later deemed "necessary" to the "consummation" of an as yet un-confirmed plan and having no defined "nexus" to a proposed plan, thwarts the administration of state tax systems. It creates the type of burdensome, contentious and unnecessary inquiries that too often plague bankruptcy court proceedings.

Second, it bears noting that actual confirmed plans result in only a small percentage of the Chapter 11 cases filed.[18] For this reason, granting tax exemptions at the beginning of a case – with an expectation that a plan will be proposed and ultimately approved down the road – is putting the cart before the horse. *See, e.g., In re 310 Associates, L.P.*, 282 B.R. 295 (S.D.N.Y. 2002) ("Any debtor could claim that a transfer will be important to a future plan of reorganization, without knowing anything about the substance of that plan."). Granting tax exemptions at the outset of a case, even though it is speculative that a plan will ever be confirmed, finds no support in the Code and creates additional difficulties and complexities that will proliferate under the Eleventh Circuit's decision. Moreover, if no

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[18] *See* Karen Cordry, *The Incredible Expanding Section 1146(c)*, 21 AM. BANK. INST. J. 10, 10 (Dec-Jan. 2003) ("vast majority of cases do not confirm a plan").

plan is ever confirmed (as is likely) or the case is converted or dismissed, state and local tax officials must attempt to "unravel" or "undo" these unwarranted section 1146(c) exemptions thereby creating an unnecessary and burdensome strain on the administration of the tax systems.[19]

These types of unnecessary and unwarranted burdens are the natural result of the Eleventh Circuit's overly broad construction of section 1146(a). Bankruptcy courts in the Eleventh Circuit will logically see increased attempts to get approval of tax exemptions immediately upon the filing of a bankruptcy petition and long before any plan is proposed, let alone confirmed. Real estate recording taxes, like Florida's, are invariably collected when the deed is recorded or when some other instrument of transfer is delivered. As a result, it has become increasingly necessary for the Florida Department of Revenue to not only oppose efforts to obtain premature tax exemptions, but to attempt to require that any tax revenues be placed in escrow until a plan is actually proposed and confirmed thereby defensively protecting tax revenues and, in effect, transforming section 1146(c) into a tax rebate statute. In addition, the proliferation of tax exemptions for pre-confirmation transfers creates the potential for "stealth orders" that may go unnoticed by state and local taxing authorities, further burdening tax administration.[20]

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[19] Cordry, *supra* note 18, at 10.

[20] *Id.*

Third, the Eleventh Circuit's expansive, non-textual approach will likely fuel the "creative" approaches of debtors to further expand the exemption's reach. Even before its decision in *Piccadilly Cafeterias*, the Eleventh Circuit's decision in *T.H. Orlando* was criticized because it "invites all manner of creative tinkering with Chapter 11 plans" such that asset transfers can be structured "in such a way that they can be characterized, rightly or wrongly, as 'necessary to the consummation' of a plan of reorganization."[21] In *T.H. Orlando*, the Eleventh Circuit allowed a transfer of *non-debtor* property between two *non-debtors* to be exempted from the tax. Because the underlying transfer of non-debtor property between two third-party non-debtors was arguably necessary for the debtor to receive its loan, the court held that it could grant an exemption from taxes on such third-party transactions. These types of "machinations will only make life harder for bankruptcy judges called upon to adjudicate the confirmability of a Chapter 11 plan."[22]

The potential for abuse in such situations is precisely what occurred in *NVR*, where a homebuilder in financial distress made 5,571 transfers of real property in an 18-month period following its filing under Chapter 11, paying over $8 million in state and local transfer and recording taxes before ultimately emerging from bankruptcy. 189 F.3d at 448. The bankruptcy court held that these pre-confirmation

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[21] Paul D. Leake & Mark G. Douglas, *Testing the Limits of the Chapter 11 Transfer Tax Exemption: In Search of the Meaning of "Under a Plan Confirmed"*, 1 N.Y.U. J. L. & BUS. 839, 855 (Summer 2005).

[22] *Id.*

transfers, which were made in the ordinary course of the debtor's business operations, were subject to the tax exemption under section 1146(c). *Id.* The debtor sought refunds, but the Fourth Circuit held tax exemptions are unavailable for these types of pre-confirmation transfers.

The situation in *NVR* is not unlike what Florida and other states may expect in coming years as real estate ventures invoke the bankruptcy laws and seek to avoid transfer taxes on past and proposed transfers. Debtors will routinely insert section 1146(c) exemption clauses in section 363 sale orders which are likely to be routinely approved by bankruptcy courts because, after all, a plan may ultimately be confirmed. As in *NVR*, many real estate ventures will undoubtedly claim the section 1146(c) exemption for pre-confirmation transfers with or without a section 363 sale order. The Eleventh Circuit's approach will only fuel the insupportable expansion of the limited tax exemption set forth in section 1146(c).

Finally, the broad nature of the Eleventh Circuit's interpretive holding has made it more common for companies "to enter bankruptcy with a plan for sale to be effected almost immediately after the bankruptcy case is filed with a planned distribution scheme blessed by the court, a practice which arguably gives little more than lip service" to applicable bankruptcy principles.[23] Indeed, the

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[23] *See* Honorable Nancy C. Dreher, *Eleventh Circuit parts with the Third and Fourth Circuits and holds that the § 1146(c) exemption from state stamp taxes applies to preconfirmation sales*, BANKRUPTCY SERVICE CURRENT AWARENESS ALERT (June 2007).

Eleventh Circuit's decision "only makes it easier for the process to go forward" and "[c]reditors who get the wrong end of these swift sales are increasingly unhappy; abuses will inevitably bring negative reactions from the bankruptcy courts."[24] Moreover, section 1129(d) explicitly provides that a plan may not be confirmed if "the principal purpose of the plan is the avoidance of taxes." 11 U.S.C. § 1129(d). Where, as is increasingly common, most or all of the debtor's assets are liquidated through pre-confirmation sales, and the plan merely distributes those assets in a way only slightly different from a traditional Chapter 7 liquidation, it is difficult to view these plans as being confirmed for any purpose other than avoiding taxes, producing a windfall to debtors.

In contrast to the simplicity of a plain language approach to section 1146(c), the Eleventh Circuit's construction has a substantially greater potential for mischief, unnecessary collateral litigation, and unnecessary expenditures of resources and time. The "plain meaning approach" supports the "sound functioning of the bankruptcy system" and thereby is the most workable. *See Lamie*, 540 U.S. at 537 (reasoning that "[i]f we add to all this the apparent sound functioning of the bankruptcy system under the plain meaning approach," any expansion of the system beyond the plain meaning is inappropriate). Nothing in the record suggests that the plain meaning given to section 1146(c) by the Third and Fourth Circuits has caused disruption. *Id.* (noting that "[s]eeming order has attended" application of challenged rule). For all these reasons, this Court should reject the Eleventh Circuit's broad and

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[24] *Id.*

limitless application of section 1146(c) to prevent misuse of its limited exemption.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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IN THE

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STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Petitioner,

v.

PICCADILLY CAFETERIAS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether 11 U.S.C. § 1146(a) of the Bankruptcy Code, which exempts from any stamp or similar taxes the transfer of assets "under a plan confirmed under section 1129" of the Code, may apply to the transfer of assets occurring prior to confirmation of the plan.

CORPORATE DISCLOSURE STATEMENT

Piccadilly Cafeterias, Inc. is now known as Capital City Cornichon Corporation. The ownership structure has not changed since Piccadilly's prior disclosure set forth in its Brief in Opposition to the petition for writ of certiorari.

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PRELIMINARY STATEMENT

This matter arises from the chapter 11 bankruptcy case of Piccadilly Cafeterias, Inc. ("Piccadilly"). Petitioner is the State of Florida, Department of Revenue ("Florida"). After Piccadilly filed for bankruptcy, Piccadilly reached an agreement with its creditors regarding the sale of substantially all of its assets and the distribution of the proceeds. This agreement formed the basis for Piccadilly's plan that the bankruptcy court later confirmed. Prior to the bankruptcy court's confirmation of the plan, Piccadilly sold substantially all of its assets to a third-party purchaser. Florida seeks to impose a stamp tax on the instruments effecting the transfer of certain of these assets.

Pursuant to section 1146(a) of the Bankruptcy Code, 11 U.S.C. § 1146(a), a State may not impose a stamp tax on an instrument of transfer "under a plan confirmed under section 1129 of this title." Florida reads this phrase to impose a temporal limitation: in order for the exemption to apply, the transfer must occur *after* the plan is confirmed. But the statute is not worded that way, and, in context, is ambiguous because the language can be read plausibly as imposing no such temporal restriction. Under the Bankruptcy Code, a debtor commonly will sell assets during the bankruptcy proceedings in furtherance of its plan prior to confirmation of the plan, as happened in this case. In context, the better reading of the statute is that the exemption applies so long as the transfer is instrumental to a plan that is confirmed under section 1129, regardless of whether the transfer occurs before or after confirmation. The transfers

qualify under this standard, and the Court should affirm the decision below.

STATEMENT

A. General Background

Founded in 1944, Piccadilly was once one of the largest cafeteria chains in the United States. Pet. App. ("PA") 12a; Joint App. ("JA") 69a. In 1999, Piccadilly operated 254 locations and generated net sales of approximately $496 million. JA 71a. Unfortunately, Piccadilly's fortunes declined and, by October 29, 2003, Piccadilly's operations had shrunk to 145 restaurants in fifteen states, and its annual net sales had declined to $320 million for the fiscal year ended July 1, 2003. JA 69a. At the same time, Piccadilly remained saddled with large debts. Although Piccadilly had closed many underperforming restaurants, it remained obligated to pay rent on many of the leases for these closed locations. In addition, Piccadilly faced pension plan liabilities and other debt burdens left over from when it was a much larger enterprise. JA 72a-73a. In short, with declining sales, Piccadilly faced all the economic stress of a rapidly down-sizing company.

By mid-2003, Piccadilly was unable to make a $5 million installment payment due to certain of its lenders. JA 73a. Piccadilly was also unable to make a scheduled contribution to its defined-benefit pension plan. *Id.* During this period of financial turmoil, Piccadilly hired a turnaround manager to assist in restructuring its operations, and Piccadilly analyzed its options. JA 73-74a. Ultimately, Piccadilly

formed a plan: it concluded that the best way to maximize its value and pay creditors as much as possible was to market and sell the company aggressively. JA 74a.

B. Pre-Bankruptcy Events

It is axiomatic that the quick, forced-sale liquidation of an insolvent company's assets will generally realize less value than if the same assets are marketed and sold as part of a more strategic, negotiated transaction. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 539 (1994) ("property that *must* be sold [through a quick liquidation procedure] is simply *worth* less. No one would pay as much to own such property as he would pay to own real estate that could be sold at leisure and pursuant to normal marketing techniques."). For insolvent companies such as Piccadilly, however, negotiating the sale of their assets in a manner designed to maximize their value is often complicated -- and frequently impossible -- outside the bankruptcy process.

First, buyers typically will not pay anything for assets that are encumbered with liabilities that exceed their value. For example, if a company's assets are worth $100 million, but the assets are encumbered with $200 million in debt, no rational buyer would pay anything for the assets unless the buyer could purchase them free and clear of at least most of the debt.[1] Thus, in order to sell their assets other

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[1] That is the situation here. Although Piccadilly eventually sold its assets for $80 million, its debts exceeded $160 million. *See*

than through foreclosure, insolvent companies typically must find a way to do so free and clear of the claims and encumbrances of creditors. Outside of bankruptcy, however, insolvent companies such as Piccadilly -- with numerous assets and many creditors -- often find it impossible to sell their assets free and clear of claims and encumbrances.

Although in some circumstances some creditors might consent to release their claims outside of bankruptcy in exchange for stipulated recoveries, holdouts can thwart the process in order to extract disproportionate distributions. Further, if the debtor's creditors are large in number or sufficiently diverse (or both), it may be impractical to solicit their consent. Similarly, if the debtor cannot pay all claims in full, negotiations with creditors often break down over which creditors should bear the brunt of any loss. Bankruptcy law supplies a means to overcome these problems by permitting sales free and clear of the claims and encumbrances of creditors regardless of their consent, and by providing a mechanism for the fair apportionment of the proceeds among competing claimants. *See, e.g.*, 11 U.S.C. §§ 363(b) (providing for sales of assets out of the ordinary course of business), 363(f) (permitting sales free and clear of claims and interests); 507 (prescribing distribution priorities in bankruptcy).[2]

Ex. B to Amended Joint Disclosure Statement by Debtor, Piccadilly Cafeterias, Inc. (summarizing pre-petition claims).

[2] In bankruptcy parlance, a sale of all or substantially all of a debtors' assets is typically a sale "out of the ordinary course of

Second, for insolvent companies such as Piccadilly, negotiating a sale is often complicated because, after an insolvent company begins defaulting on its obligations, at least some creditors inevitably commence debt collection actions to recover what is owed them. In particular, a creditor who fears being left unpaid while others receive payment may move quickly to seize and liquidate the debtor's assets. This may have the unfortunate effect of destroying the debtor's business as a going concern before the business can be sold. Once again, bankruptcy law provides mechanisms to prevent this from occurring. *See* 11 U.S.C. § 362(a) (enjoining debt collection activity after the commencement of a bankruptcy case to facilitate, among other things, the orderly disposition of the debtor's property).

Of course, in order for the bankruptcy process effectively to facilitate a sale and subsequent distribution of the proceeds among creditors, it is necessary to locate a willing buyer for the debtor's assets. In

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business." *See Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986) (citing *Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063 (1983)); *see also In re Roth American, Inc.*, 975 F.2d 949, 953 (3d Cir. 1992) (inquiry into whether particular transaction is in the ordinary course of a debtor's business includes whether "the transaction is of the sort commonly undertaken by companies in that industry" and "the interested parties' reasonable expectations of what transactions the debtor in possession is likely to enter in the course of its business" (internal quotation marks and citation omitted)).

this case, Piccadilly began the process of finding a buyer *before* it commenced its chapter 11 case.

Piccadilly initially identified 223 potential purchasers of its business. JA 74a. Of these, 38 executed confidentiality agreements in order to receive in-depth, strategic information regarding the company and its operations. *Id.* Piccadilly then negotiated with these interested parties for the best terms and price. Ultimately, Piccadilly identified Piccadilly Acquisition Corporation ("PAC"), an affiliate of Tru-Foods Corporation, as the best prospect, and executed a purchase agreement with PAC for the sale of its assets for approximately $54 million. JA 75a. The agreement expressly contemplated that Piccadilly would commence a chapter 11 bankruptcy case, and that during the bankruptcy proceedings, PAC's offer would be subject to higher and better bids. *Id.* In other words, prior to filing for bankruptcy, Piccadilly managed to flesh out two of the most critical components of its plan: the sale of its assets for a significant sum, and a method for maximizing their value by making PAC's offer subject to higher bids in bankruptcy.

C. Piccadilly's Bankruptcy Filing

Armed with a $54 million offer for its assets, Piccadilly commenced its chapter 11 case on October 29, 2003 by filing a bankruptcy petition with the bankruptcy court. By operation of law, when a debtor such as Piccadilly files a bankruptcy case, an estate is created consisting of all the debtor's assets, wherever located. 11 U.S.C. § 541.

In chapter 11 cases, a trustee is not usually appointed, and the debtor typically continues to manage its business as the "debtor in possession" of the estate. 11 U.S.C. §§ 1101(a) (defining "debtor in possession" in a chapter 11 case), 1107 (prescribing duties of debtor in possession, including duties of trustee), 1108 (authorizing operation of business during chapter 11 proceeding). Accordingly, after it commenced its bankruptcy case, Piccadilly continued to operate its business as a "debtor in possession."

After a debtor commences a bankruptcy case, the provisions of the automatic stay apply, preventing creditors from taking action against estate property, or otherwise dismantling the estate. 11 U.S.C. § 362(a). Accordingly, after Piccadilly commenced its chapter 11 case, its creditors were generally enjoined from pursuing debt collection activity against it or its assets.

Under the Bankruptcy Code, a debtor's monetary obligations constitute "claims" against the debtor's estate. The Code provides that any "creditor" holding a "pre-petition" claim is entitled to file a "proof of claim" with the bankruptcy court. 11 U.S.C. §§ 101(10) (defining "creditor" as an entity holding a pre-petition claim), 501(a) (providing for the filing of proofs of claim), 502(b) (providing for the allowance or disallowance of claims); Fed. R. Bankr. P. 3001, 3003. As used herein, the term "pre-petition" refers to claims or events arising or occurring before the filing of a bankruptcy petition commencing a bankruptcy case. Conversely, the term "post-petition" refers to claims or events arising or occurring after the filing.

If a creditor holds a pre-petition claim, the creditor (including a state entity) generally must file a proof of claim in order to receive a distribution. Fed. R. Bankr. P. 3002(a); *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933).[3] If a creditor files a proof of claim, and no party in interest objects, the claim is deemed allowed against the estate, and may be paid from funds available to pay claims in accordance with the Bankruptcy Code's priority provisions. 11 U.S.C. § 502(a); *see generally* 11 U.S.C. § 507 (specifying general priorities in bankruptcy). If a party in interest objects to the claim, however, the bankruptcy court must allow the claim except to the extent that one of the grounds for disallowance set forth in section 502 applies. 11 U.S.C. § 502(b).

In general, the Bankruptcy Code prescribes different mechanisms for the determination and payment of expenses that the *estate* incurs *post-petition* during the course of the bankruptcy case. Specifically, section 503 provides generally that "[a]fter notice and a hearing, there shall be allowed, administrative expenses . . . including . . . the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A). The administrative expense designation is significant because, under the Code's general priority provisions, administrative expenses are granted the second-highest general payment priority ahead of most pre-petition claims. 11 U.S.C. § 507(a)(2) (prescribing the second-highest general

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[3] The term "creditor" specifically includes a "governmental unit." 11 U.S.C. §§ 101(15), 101(27).

priority for "administrative expenses allowed under section 503(b)"). In this case, Florida contends that its claim for Piccadilly's alleged stamp tax liability is entitled to priority treatment as an administrative expense. JA 48a (original claim of $2,000,000, later reduced to $39,200).

After the commencement of a bankruptcy case, the Office of the United States Trustee generally appoints a committee of unsecured creditors to take part in the administration of the case. 11 U.S.C. §§ 1102 (providing for the appointment of a creditors' committee), 1103 (prescribing the powers and duties of a creditor's committee); *see* 28 U.S.C. §§ 581, *et seq.* (governing the functions of the Office of the United States Trustee). Shortly after Piccadilly filed its bankruptcy petition, the U.S. Trustee appointed a creditors' committee consisting of seven of Piccadilly's largest unsecured creditors. JA 76a. In addition to the official creditors' committee, several of Piccadilly's secured creditors formed an unofficial "ad hoc committee" to represent the interests of the holders of certain of Piccadilly's outstanding senior secured notes. JA 61a.[4] Throughout the proceedings, Piccadilly negotiated with these committees regarding how it would dispose of its assets and distribute

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[4] Section 1102(a) provides for the appointment of an official committee of creditors holding "unsecured" claims -- meaning claims not backed by any particular lien or security interest in the debtor's property. *See* 11 U.S.C. § 506(a) (defining what constitutes a secured claim in bankruptcy). The Code generally contemplates that the holders of secured claims will represent themselves, or will form unofficial ad hoc committees.

the funds to pay the creditors' claims. In other words, as explained more fully below, Piccadilly actively negotiated the contours of its plan.

D. The Plan and Sale

The practical aim of chapter 11 is the successful confirmation of a negotiated plan that provides for the debtor's retention or sale of its assets, and the payment of claims. *See* 11 U.S.C. §§ 1123 (prescribing the contents of a chapter 11 plan), 1123(b)(4) (providing that a chapter 11 plan may "provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds among holders of claims or interests"), 1129 (prescribing the rules governing confirmation of a plan); *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle St. P'ship*, 526 U.S. 434, 457 n.28 (1999) ("the Chapter 11 process relies on creditors and equity holders to engage in negotiations toward resolution of their interests") (quotation marks and citations omitted). As noted, Piccadilly began formulating its plan well before it commenced its bankruptcy case, and the signature feature of its plan was the sale of its assets as a going concern for the highest price possible. A going-concern sale is a form of reorganization, and Piccadilly sought to reorganize in this manner.

With respect to the timing of any sale, Piccadilly faced two choices: (1) sell its assets after confirmation of a plan, or (2) sell its assets as soon as practicable. Significantly, the Bankruptcy Code permits either.

To begin with, section 363(b) permits a debtor in possession, with bankruptcy-court approval, to sell its assets "out of the ordinary course of business" at any time during the bankruptcy case. 11 U.S.C. § 363(b).[5] Alternatively, the Code permits a debtor to sell its assets pursuant to the terms of a confirmed plan. 11 U.S.C. § 1123(a)(5)(B), 1123(b)(4). The Code provides this flexibility because the plan-confirmation process can take a considerable amount of time. In some cases, such as this one, the expeditious sale of the debtor's assets may realize more than a delayed sale (*e.g.*, the value of the debtor's business may be deteriorating due to aggressive competition, declining sales, loss of employees, loss of customers, need for capital investment, etc.). In this case, the bankruptcy court determined that Piccadilly had "sound business reasons" for conducting a prompt sale of its assets, and that the expeditious sale was "in the best interests of creditors . . . and other parties in interest." JA 32a.

Accordingly, on October 29 and 30, 2003, Piccadilly filed motions seeking the bankruptcy court's approval of the sale of its assets on certain terms and conditions. JA 77a-78a. In particular, Piccadilly sought approval of the sale to PAC for $54 million, subject to higher and better bids. JA 78a. Piccadilly also sought approval of competitive bidding procedures and the scheduling of a hearing to approve a final sale to the highest bidder. *Id.* Finally, Picca-

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[5] *See supra* note 2 (discussing meaning of the phrase "out of the ordinary course of business").

dilly requested relief under section 1146(a) of the Bankruptcy Code from the imposition of stamp taxes on the transfer of its assets, stating that it intended "to use the proceeds of the Sale as the basis for its plan." PA 12a. On December 11, 2003, the bankruptcy court approved an amended set of bidding and sale procedures. JA 79a-80a; PA 35a.

After intense competitive bidding at an auction held on February 10, 2004, Piccadilly Investment, LLC ("PI") was the highest bidder with an offer of $80 million for Piccadilly's assets. JA 80a; PA 14a. On February 13, 2004, the bankruptcy court conducted a hearing to consider the approval of the sale of Piccadilly's assets to PI free and clear of all claims and interests (other than certain obligations that PI agreed to assume as part of the sale). JA 80a; *see also* JA 27a. On the same day, the bankruptcy court approved the sale free and clear, and, on March 16, 2004, Piccadilly closed the transaction with PI. JA 81a. The sale included the transfers of real estate located in Florida, and Florida contends that it is entitled to collect a stamp tax with respect to the deeds memorializing the transfers of this real estate. JA 115a-116a; PA 14a.

In approving the sale of Piccadilly's assets to PI, the bankruptcy court determined that having a sale free and clear of claims and encumbrances was a condition of the purchaser's willingness to buy the assets. JA 35a. Pursuant to section 363 of the Code, the court specifically ordered the sale of Piccadilly's assets "free and clear of all Liens, claims, interests and encumbrances" and specifically directed "all persons and entities, including, but not limited to, all . . .

governmental, tax and regulatory authorities . . . holding Liens, claims, interests or encumbrances of any kind or nature" against Piccadilly or the assets being sold, including any claim "arising under or out of, in connection with, or in any way related to . . . the transfer of [Piccadilly's assets to PI] shall be and hereby are forever barred, estopped and permanently enjoined from asserting, prosecuting or otherwise pursuing against [PI or its property] such persons' or entities' claims . . . ." JA 38a. The court ordered that all such claims were expressly transferred and channeled "to the proceeds of the sale . . . ." JA 39a.

Regarding Florida's stamp tax that might be imposed on any instrument of transfer, the bankruptcy court expressly found that "[t]he sale of [Piccadilly's assets to PI is] in contemplation of a plan and, accordingly, the transfer of the [assets to PI is] exempt, under section 1146(c) [recodified as section 1146(a)] of the Bankruptcy Code, from any transfer, stamp or similar tax." JA 46a.

E. The Plan and Global Settlement

Prior to selling its assets, Piccadilly engaged in extensive negotiations with its creditors regarding the disposition of the proceeds from the contemplated sale. On or about January 26, 2004, Piccadilly entered into an agreement with the creditors' committee and the ad hoc committee regarding disposition of the sale proceeds (the "Global Settlement"). JA 81a-82a. Under the terms of the Global Settlement, the creditors' committee and the ad hoc committee (1) agreed to support the sale of Piccadilly's assets, (2) agreed to a specified disposition of the proceeds of

the sale, and (3) agreed to support confirmation of a plan based on the sale of Piccadilly's assets and the settled disposition of the proceeds under the terms of the Global Settlement. JA 82a-83a. On February 25, 2004 -- prior to the closing of the sale of Piccadilly's assets to PI -- the bankruptcy court entered an order approving the Global Settlement. JA 86a. As the district court subsequently concluded, the Global Settlement "resolved, among other things, the priority of distribution among [Piccadilly's] creditors and in many ways was analogous to a confirmed plan." PA 15a; *see also* PA 3a. On March 26, 2006 -- ten days after it closed the sale with PI -- Piccadilly filed its original chapter 11 plan with the bankruptcy court.[6]

Creditors are entitled to vote on a plan, and in order to ensure that the creditors' vote is properly informed, the debtor is required to prepare and distribute a disclosure statement explaining, among other things, the plan, the creditors' treatment under the plan, alternatives to the plan, and any relevant contingencies that may affect the creditors' treatment. 11 U.S.C. § 1125 (prescribing the contents of a disclosure statement). In this case, Piccadilly prepared a disclosure statement to accompany its plan. JA 50a. Thereafter, creditors voted on and approved the plan, and, on October 21, 2004, the court confirmed the plan. JA 122a, 127a. The plan provides

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[6] Piccadilly began drafting the plan document on February 10, 2004, as indicated in the attorneys' time records filed subsequently with the bankruptcy court.

for distributions to creditors from the proceeds of the sale of Piccadilly's assets to PI as provided in the Global Settlement. JA 86a. Significantly, as explained in the disclosure statement, the plan is based on the Global Settlement and contains terms "substantially similar to the provisions set forth in the Global Settlement . . . ." JA 86a. Further, the Global Settlement plainly contemplated the sale of Piccadilly's assets, and it was pursuant to the Global Settlement that the various creditor groups agreed to support the sale. JA 83a (noting that the Global Settlement provided that "the Parties to the Global Settlement . . . shall not object to and shall support the Sale").

The sale was necessary for distributions under the plan. PA 40a. Reflecting this, the bankruptcy court's order confirming the plan provides: "Pursuant to section 1146(c) [now 1146(a)] of the Bankruptcy Code, the issuance, transfer or exchange of any security or the making or delivery of an instrument of transfer under this Plan may not be taxed under any law imposing a stamp tax or similar tax. Any sale of any Asset occurring before, after or upon the [effective date of the plan] (including the sale) shall be deemed to be in furtherance of this Plan." JA 129a.

F. Florida's Stamp Tax

Florida contends that it is entitled to collect a tax on the real property transfer deeds discussed above by virtue of Fla. Stat. § 201.02, which provides for the imposition of a "stamp tax" on the transfer of real estate in the amount of $.70 for every $100 of consid-

eration for the transfer. A current Florida regulation implementing this statute mirrors the decision of the Eleventh Circuit in this case (as well as other decisions) and provides: "Transfer in Bankruptcy: Sale of real property by trustees, debtors or receivers in federal bankruptcy proceedings is subject to tax unless the transfer is made pursuant to a plan confirmed under § 1129 of the Bankruptcy Code, is a precondition or essential to the confirmation of the plan, or is necessary to consummate or implement a confirmed plan and the debtor is a party to the transfer." Fla. Admin. Code. Ann. R. 12B-4.014(15) (citing cases).

G. The Decisions Below

Florida objected unsuccessfully to the bankruptcy court's approval of the sale of Piccadilly's assets free and clear of all claims and encumbrances, and, specifically, the court's determination that the transfer of the assets would be exempt from any stamp tax. PA 36a. Florida likewise objected unsuccessfully to confirmation of the plan. PA 38a-39a. Pending resolution of Florida's claim that Piccadilly owes a stamp tax in connection with the transfer of certain of its assets to PI, the bankruptcy court required Piccadilly to escrow sufficient funds to pay Florida's claim. JA 115a. Thereafter, Florida filed a complaint with the bankruptcy court, asserting that Piccadilly was required to pay a stamp tax in the amount of $39,200. JA 113a; PA 40a.

On Piccadilly's motion for summary judgment, the bankruptcy court determined that Piccadilly was not liable for any stamp tax in connection with the

sale of its assets. During oral argument, Piccadilly stated that "[t]here would be no plan in this case had there not been the sale of this property, had there not been the global settlement agreement that set up the sale of the property and that set up the framework of the plan." PA 17a. Florida itself stated that "the actual sale itself contemplated the liquidating plan." *Id.* The bankruptcy court found that Piccadilly's transfer of substantially all of its assets to PI was "'under' the Plan because such transfer was necessary to consummate the Plan." PA 40a. The court further reasoned that "[t]he sale of substantially all of the assets of [Piccadilly] contemplated the liquidating plan, which sale and plan were so interwoven that one could not proceed without the other." *Id.* The court likewise concluded that the sale of Piccadilly's assets "was necessary to the consummation of the confirmed Plan because the sale of [Piccadilly's] assets generated the proceeds required to fund the Plan." *Id.*

On appeal, the district court affirmed. The court acknowledged that the proper starting point in the analysis is to begin with the text of section 1146. PA 25a. The court found, however, that this inquiry is not particularly helpful because the text is capable of being read in several ways, and is therefore "ambiguous." *Id.* The court reasoned that it was required to look to other "tools of statutory interpretation for help." *Id.*

The court observed that the clear purpose of section 1146(a) is to provide tax relief to facilitate the chapter 11 process. PA 24a (quoting *City of New York v. Jacoby Bender, Inc. (In re Jacoby-Bender),*

758 F.2d 840, 841 (2d Cir. 1985)). The court acknowledged further that "[t]here are times when it is more advantageous for the debtor to begin to sell as many assets as quickly as possible in order to insure that the assets do not lose value." PA 24a (quotation marks and citation omitted). The court found it improbable that Congress would have intended to grant tax relief for a sale that occurs just after confirmation of a plan and is essential to it, but deny the same relief to the same sale that occurs just before confirmation. "Neither party disputes that the vagaries of the market often dictate that time is of the essence and that waiting for a plan to be confirmed before making a sale will often be detrimental, or even fatal, to the ultimate confirmation of the plan." PA 28a. Finding a direct connection in this case between the sale of Piccadilly's assets and its plan, the court affirmed the bankruptcy court's decision. The district court declined, however, to articulate a particular standard for determining when a pre-confirmation transfer qualifies for the exemption, noting that it had been presented only with the "limited question" of whether section 1146(a) *may* apply to such transfers. PA 28a. The court observed, however, that, at a minimum "there must be some nexus between the pre-confirmation sale and the confirmation plan." PA 29a.

The court of appeals also affirmed. Like the district court, the Eleventh Circuit concluded that the text of section 1146 is ambiguous because "the statute can plausibly be read either as describing eligible transfers to include transfers 'under a plan confirmed' regardless of *when* the plan is confirmed *or* . .

. imposing a temporal restriction on when the confirmation of the plan must occur." PA 7a. In choosing between these two readings, the court noted that, when Congress intends to place a temporal restriction on particular relief under the Bankruptcy Code, it knows how to do so, and does so expressly. PA 7a-8a. That Congress placed no express temporal restriction in section 1146 demonstrates that Congress did not intend one to exist. PA 8a.

The court likewise observed that, although tax exemptions are to be construed narrowly, "it is equally true that 'we are not to abrogate the purpose of the exemption through too narrow an application.'" PA 8a (quoting *In re Hechinger Inv. Co. of Del., Inc.*, 335 F.3d 243, 259 (3d Cir. 2003) (Nygaard, J., dissenting)). The court found this to be especially so "in light of the principle that a remedial statute such as the Bankruptcy Code should be liberally construed." PA 8a. Further, the court observed that Florida's restrictive interpretation of section 1146 "ignores the practical realities of Chapter 11 reorganization cases." *Id.* The court reasoned that "it is just as probable that a debtor may need to close a sale as a condition precedent to the parties' willingness to proceed with confirmation of a plan as it is for the parties to agree on the terms of a plan, obtain confirmation, and then determine what the sale will bring." *Id.* The court concluded that sales that precede confirmation may qualify for the statutory exemption. PA 9a.

Like the district court, the court of appeals declined to articulate a precise standard for determining when a pre-confirmation transfer qualifies for the

exemption under section 1146(a). The court observed that Florida had argued only that the exemption "*never*" applies to pre-confirmation transfers, not that the exemption applies to some pre-confirmation transfers but not others, and that the issue of the precise standard to distinguish pre-confirmation transfer that qualify for the exemption from those that do not had not been briefed. PA 9a & n.5. Thus, the court determined that the issue of a precise standard "is not properly before us." *Id.* The court observed, however, that, at a minimum, there must be "some nexus between the pre-confirmation sale and the confirmed plan." PA 8a-9a.

SUMMARY OF ARGUMENT

Section 1146(a) is ambiguous. Considered both in isolation and in context with other provisions of the Bankruptcy Code, the section may be read to apply to (1) transfers of property that are instrumental to a plan that is confirmed regardless of whether the transfer occurs before or after confirmation, or (2) transfers that are instrumental to a plan that follow confirmation. Although the contextual evidence favors the first reading, either is plausible. Accordingly, it is appropriate to consider other evidence of the section's meaning, including its purpose, structure, and history, as well as the purposes and structure of the Bankruptcy Code as a whole.

The purpose of section 1146(a) is to facilitate the chapter 11 process through tax relief. Likewise, the relevant purposes of the Bankruptcy Code are to preserve going concerns and maximize property available to satisfy the claims of creditors. The Eleventh

Circuit's conclusion that section 1146(a) applies to pre-confirmation transfers with an appropriate nexus to a plan facilitates these purposes; Florida's interpretation frustrates them. By imposing a stamp tax, Florida seeks to surcharge the transfer of Piccadilly's property, which can only serve to discourage transfers by raising their cost, and correspondingly diminish funds available to creditors.

Florida's reading also creates an unwarranted anomaly. Under Florida's interpretation, a transfer that is largely trivial to a plan that occurs just after confirmation is entitled to the exemption, whereas a transfer that occurs just before confirmation never is, no matter how critical the latter may be to the plan. It is not plausible that Congress would have intended such an anomaly.

The structure of the Bankruptcy Code further supports the Eleventh Circuit's reading that section 1146(a) applies to pre-confirmation transfers with an appropriate nexus to a plan that is confirmed. The Code permits sales prior to confirmation, including sales critical to the reorganization and confirmation processes. In this case, the prompt sale of Piccadilly's assets was critical to its plan. The Code endorses precisely the series of events that occurred in this case, and there is no reason to conclude that Congress intended to create an incentive to avoid pre-confirmation value-maximizing transactions by construing section 1146(a) as inapplicable to transfers critical to a plan that occur before confirmation.

The history behind section 1146(a) also supports the Eleventh Circuit's interpretation in this case.

Through numerous iterations over the years, Congress has continuously expanded the scope of the exemption. Likewise, in explaining the section, Congress did so in a manner that suggests that it applies to chapter 11 transfers generally, rather than simply to those occurring after confirmation.

Finally, various canons of construction support the Eleventh Circuit's reading. At bottom, Florida seeks to impose a temporal restriction on the text of section 1146(a) by limiting its application to post-confirmation transfers. But when Congress intends to place temporal restrictions on relief under the Code -- for example, to restrict certain relief to the pre- or post-confirmation period -- it does so expressly with language such as "after confirmation" or "before confirmation." The fact that Congress did not do so in section 1146(a) demonstrates that Congress did not intend such a restriction to apply to the section.

In addition, it must be kept in mind that Florida seeks to recover its stamp tax as a priority expense of administration ahead of the claims of most of Piccadilly's other creditors. In chapter 11 cases, a debtor may not confirm a plan unless the debtor pays all administrative expenses in full in cash. This obviously imposes a financial burden on debtors seeking confirmation, and correspondingly diminishes a debtor's prospects for success, which is obviously contrary to the purposes of section 1146(a) and the Code as a whole. Under the Court's precedents, Florida's attempt to transform a disfavored stamp tax liability into a priority claim is contrary to established inter-

pretive principles. The better reading of the phrase a "transfer under a plan confirmed under section 1129" is a transfer instrumental to a plan that is confirmed under section 1129, regardless of whether the transfer occurs before or after confirmation. Because the transfers in this case fall within this standard, the Court should affirm the decision below.

ARGUMENT

A. Section 1146(a) Is Ambiguous.

Section 1146(a) provides: "The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax." 11 U.S.C. § 1146(a). Thus, section 1146(a) exempts from "any law imposing a stamp tax or similar tax" (1) "the making or delivery of an instrument of transfer" (2) "under a plan confirmed under section 1129." Florida's stamp tax plainly qualifies as a "stamp tax or similar tax." Likewise, the documentary deeds transferring property from Piccadilly to PI on which Florida seeks to impose its tax qualify as "the making or delivery of an instrument of transfer." Further, because the bankruptcy court confirmed Piccadilly's plan under section 1129 of the Bankruptcy Code, there is in this case "a plan confirmed under section 1129." The question is whether the relevant transfers occurred "*under* a plan confirmed under section 1129."

Florida asserts that only transfers that occur after a plan is confirmed are entitled to the statutory exemption. To reach this conclusion, Florida reads a

temporal limitation into the text, arguing that "a reorganization plan . . . must first be proposed and confirmed" and that "only those transfers that flow from and occur after the plan's confirmation are entitled to tax exemptions." Pet. Br. 12. The court below, of course, read the statute differently. It concluded that, although the text is ambiguous, the better reading is that the statute affords the exemption to transfers with an appropriate nexus to a plan regardless of whether the transfers occur before or after confirmation. PA 7a. Although the Eleventh Circuit's conclusion is correct, both readings are at least plausible. Accordingly, section 1146(a) is ambiguous, and the question becomes which reading best comports with the purpose, structure, and history of the provision, as well as the Bankruptcy Code of which it is a part.

In general, when the language of a statute admits of two plausible interpretations, it is facially ambiguous. *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 419 n.2 (2005). Reference to the text of a provision in isolation, however, is not dispositive: statutory ambiguity "is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Thus, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

Context is critical for two reasons. A statutory provision that seems clear in isolation may, in fact,

be ambiguous when considered in the larger context of the statutory scheme of which it is a part. *See id.* (although the term "employees" as used in a particular statute appeared "at first blush" to mean current employees, "[t]his initial impression . . . does not withstand scrutiny in the context of" the statutory provision). Conversely, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme," for example "because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

Under the Court's standards, section 1146(a) is a textbook example of ambiguity. First, the language of the section in isolation readily admits of more than one plausible interpretation. Second, analysis of the section's text alongside the text of the Bankruptcy Code as a whole plainly supports more than one reading. Although exhaustive contextual review of section 1146(a) demonstrates that the Eleventh Circuit's interpretation has considerably more support than Florida's, the statute remains sufficiently ambiguous to require resort to other considerations to demonstrate its meaning.

1. The text of section 1146(a) itself is ambiguous.

In construing the phrase "under a plan confirmed," the Eleventh Circuit observed that section 1146(a) "can plausibly be read either . . . to include

transfers 'under a plan confirmed' regardless of *when* the plan is confirmed *or* . . . imposing a temporal restriction on when the confirmation of the plan must occur." PA 7a. Although the court adopted the first reading, it acknowledged that the text "is ambiguous." *Id.*

In *In re Hechinger Investment Co. of Del., Inc.*, 335 F.3d 243 (3d Cir. 2003), the majority of the Third Circuit panel stopped short of labeling the statute "ambiguous." Nevertheless, the majority refused to read the text as embracing only one possible construction. In concluding that section 1146(a) applies solely to transfers that occur after confirmation of a plan, the majority interpreted the phrase "under a plan confirmed" to mean "authorized by a confirmed plan." *Id.* at 252-53. The majority acknowledged that "we do not go so far as to say that this is the only plausible interpretation of that term." *Id.* As the majority explained, "[t]he preposition 'under' is of course very common, and it can have many different meanings in different contexts." *Id.* at 252. For example, "an accepted definition of the preposition 'under' is 'in accordance with,' and 'accordance' may mean 'agreement.'" *Id.* at 253. Thus, "we cannot say that the language of section 1146(c) [now 1146(a)] rules out the possibility that 'under a plan confirmed' means 'in agreement with a plan confirmed.'" Rather, "on this reading," the statute may exempt from taxation transfers that occur prior to confirmation. *Id.*

In his dissent in *Hechinger*, Judge Nygaard analyzed the same text and concluded that it is ambiguous. *Id.* at 257. He reiterated that the term "under"

has many potential meanings depending on the context in which it is used, and can be "a preposition, adverb, adjective, noun, or verb." *Id.* at 258. Given the term's highly variable definitional nature and exceptionally frequent usage, he doubted whether it was sound to give the provision a fixed or preferred meaning even when used more than once within the same sentence. *Id.* Judge Wilkinson similarly explained in his concurrence in *In re NVR, LP*, 189 F.3d 442, 458 (4th Cir. 1999), that "[i]t is not plain to me that section 1146(c) [now 1146(a)] contains a temporal element" or that "one must read the section to say anything about the relationship between plan confirmation and the timing of a transfer." As he elaborated, "[i]t is equally possible that the provision requires only that the transfer occur 'under' -- i.e., that it be inferior or subordinate to -- 'a plan' that is ultimately 'confirmed.'" *Id.*

The variability of the term "under" is well documented. The American Heritage Dictionary provides fifteen definitions, including "in view of," "because of," "by virtue of," as well as "[s]ubject to the restraint of." AMERICAN HERITAGE DICTIONARY 1395 (1976). Other definitions include "as designated, indicated, or represented by," "in accordance with," and "in the state or process of." http://dictionary.reference.com/browse/under. Black's Law Dictionary defines the term to include "inferior" or "subordinate." BLACK'S LAW DICTIONARY 1525 (6th ed. 1990). Moreover, this Court has recognized that "[t]he word 'under' has many dictionary definitions and must draw its meaning from its context." *Ardestani v. INS*, 502 U.S. 129, 135 (1991).

Given the imprecise manner in which section 1146(a) is drafted, coupled with the variable meaning of the term "under," section 1146(a) is facially susceptible to competing interpretations. Quite plausibly, the phrase "under a plan confirmed" can be read to mean "in accordance with a plan that is confirmed" without imposing any temporal requirement on *when* the plan must be confirmed in relation to the transfer. Alternatively, it can be read to mean "authorized by a confirmed plan," suggesting that the plan must be confirmed before the transfer. Accordingly, it is not possible to conclude by reference to the text of Section 1146(a) alone that the provision is susceptible to a single plausible reading, and the statute is thus facially ambiguous.

2. In context with the Bankruptcy Code, section 1146(a) is ambiguous.

The statute's ambiguity becomes even more pronounced with considered in context with other provisions of the Bankruptcy Code. To begin with, if Congress had intended section 1146(a) to apply only to transfers occurring *after* confirmation, it could easily have said so by placing an express temporal limitation in the statute like the express temporal limitations that appear elsewhere in the Code. For example, section 1127 governs modifications to a chapter 11 plan, and provides in section 1127(a) that the proponent of a plan may modify a plan "at any time before confirmation." 11 U.S.C. § 1127(a). Likewise, section 1127(b) provides that, subject to certain restrictions, the proponent of a plan may modify the plan "at any time after confirmation of such plan." 11 U.S.C § 1127(b); *see also* PA 7a (listing as addi-

tional examples 11 U.S.C. §§ 1104(a) ("At any time after the commencement of the case but before confirmation of the plan . . . ."); 1104(c) ("[T]hen at any time before the confirmation of a plan . . . ."); 1105 ("At any time before confirmation of a plan . . . ."); 1114(e)(2) ("Any payment for retiree benefits required to be made before a plan confirmed under [§ 1129] is effective . . . .")). With specific reference to section 1127(b), if Congress had intended to impose a temporal restriction on section 1146(a), it easily could have written the statute to read: "For transfers occurring after confirmation of a plan, . . . an instrument of transfer under a plan . . . may not be taxed."

That Congress did not impose a clear (and commonly available) temporal limitation in section 1146(a) suggests that Congress did not intend one to exist. *See F.C.C. v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 302 (2003) ("where Congress has intended to provide . . . exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly"); *Toibb v. Radloff*, 501 U.S. 157, 161 (1991) (refusing to infer limitation on section 109 of the Bankruptcy Code, stating "Congress knew how to restrict recourse to the avenues of bankruptcy relief"). As the Court has explained, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation marks and citations omitted); *see Dole Food Co. v. Patrickson*, 538 U.S. 468, 476

(2003); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21 (1991) (where Congress placed express time limitations in other parts of act, but not in part under consideration, Court would not infer time limitation where Congress did not include it). This is especially warranted here given that in section 1146(b) -- the subsection immediately following section 1146(a) -- Congress imposed an express temporal limitation on requests for determinations of certain tax effects of the Bankruptcy Code. *See* 11 U.S.C. § 1146(b) (providing that a bankruptcy court may declare certain tax effects of the Code after the earlier of the date a government unit responds to a plan proponent's request for such a declaration or "270 days after such request"); *King*, 502 U.S. at 220-21 (comparing subsections of same statute).

Similarly, if Congress had intended section 1146(a) to apply only to transfers occurring after confirmation, it could easily have used the temporally limiting phrase "transfer of property dealt with under a confirmed plan" instead of the phrase "transfer under a plan confirmed under section 1129." Notably, Congress used precisely the first formulation in section 1142(b) applicable to "any instrument required to effect a transfer of property dealt with by a confirmed plan," which, in context, involves transfers that follow confirmation. The fact that Congress used one phrase for a particular temporal effect in section 1142(b) and a quite distinct phrase in section 1146(a) suggests that Congress intended a different effect in section 1146(a) -- in this case, a non-temporal one.

Other contextual evidence also suggests that the distinct phrase "plan confirmed under section 1129" used in section 1146(a) does not mean "confirmed plan" in the sense of a "plan that has already been confirmed." At first blush, the phrase "plan confirmed under section 1129" appears to be a cross-reference to section 1129 designed to limit the applicability of section 1146(a) to chapter 11 plans confirmed in chapter 11 cases. But the cross-reference is completely unnecessary for that purpose. Pursuant to section 103(g) of the Code, the provisions of subchapter III of chapter 11 (including section 1146) already apply *only* in chapter 11 cases. 11 U.S.C. § 103(g); *see also* 11 U.S.C. § 901 (excluding section 1146 from chapter 9 proceedings). Further, confirmation under section 1129 already is the *only* way in which a plan may be confirmed in chapter 11. 11 U.S.C. § 1129(a)(1) (providing that a plan may be confirmed "only if" the requirements of section 1129 are satisfied). Because section 1146(a) already applies in chapter 11 cases exclusively, and because chapter 11 plans already can only be confirmed under section 1129, the phrase "plan confirmed under section 1129" more likely means something else. *See Kawaauhua v. Geiger*, 523 U.S. 57, 62 (1998) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.") (quoting *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988)); *see also Dole*, 538 U.S. at 476-77 ("we should not construe the statute in a manner that is strained and, at the same time, would render a statutory term superfluous"); *United States v. Menasche*, 348 U.S.

528, 538 (1955). This is bolstered by the fact that Congress used the term "confirmed plan" in section 1142(b) to refer to a plan confirmed in a chapter 11 case under section 1129 without any explicit cross-reference to section 1129. The question becomes: what then is the meaning of the reference in section 1146(a) to "plan confirmed under section 1129" if not a superfluous cross-reference?

Avoiding a construction of section 1146(a) that renders any part of the Code superfluous, and ascribing meaning to Congress's deliberate decision to use language in section 1146(a) distinct from the text of section 1142(b), the phrase "plan confirmed under section 1129" in section 1146(a) plausibly means a plan that is confirmed at some point in time under the requirements of chapter 11. While perhaps not conclusive, this demonstrates that the meaning of the phrase "plan confirmed under section 1129" is reasonably susceptible to different interpretations.

The ambiguity of section 1146(a) is demonstrated even more dramatically by the contextual variability of the meaning of the term "under." As noted, courts have focused on the meaning of this term to discern the relationship between "transfer" and "plan" as used in section 1146(a). In *Hechinger*, the majority observed that one meaning of the term "under" is "authorized by," and if "authorized by" is substituted for "under," this suggests that the plan must precede the transfer. But as Judge Nygaard explained in his dissent in *Hechinger*, if Congress had intended the term "under" to mean the more limited "authorized by," Congress easily could have said so as it has elsewhere in the Code. *See* 335 F.3d at 258 (Nygaard, J.,

dissenting) (noting nineteen different instances in which Congress used the term "authorized" in the Code, and observing that Congress used the phrase "authorized under" at least four times). The fact that Congress used the term "under," rather than the more specific (and commonly available) "authorized by" or "authorized under," suggests that the term "under" has a different meaning, which could plausibly include one of the term's other numerous definitions.

It is certainly true, of course, that Congress uses the phrase "under" three times in section 1146(a). In *Hechinger*, the majority reasoned that the multiple use of the same term in the same sentence narrows the term's possible readings under the theory that it is preferable to construe a term to have the same meaning each time it is used in the same statute. 335 F.3d at 253-54 ("It is a 'normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'") (quoting *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986)). The majority observed that the term "authorized by" fits as a substitute for "under" each time the term appears in section 1146(a) and, thus, helps resolve the statute's meaning. But this reasoning encounters at least three critical difficulties.

First, several of the recognized alternative definitions of "under" fit plausibly as substitutes for the term in each instance in which the term appears in section 1146(a). For example, as the majority in *Hechinger* itself stated, another recognized meaning of the term "under" is "in accordance with." As modi-

fied to substitute this alternative, section 1146(a) would read: "The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer *in accordance with* a plan confirmed *in accordance with* section 1129 of this title, may not be taxed *in accordance with* any law imposing a stamp tax or similar tax." This plausible substitution also provides no basis for concluding that section 1146(a) only applies to transfers occurring after confirmation.

Second, there is no reason why a term of such common usage and variable meaning as "under" must have the same meaning each time it is used, even in the same sentence. For example, the same word "under" obviously means different things in the following sentence: "if you walk *under* the bridge you will find that, *under* my interpretation of the law, you will be subject to penalties *under* the penal code" -- namely "if you walk *beneath* the bridge you will find that, *in accordance with* my interpretation of the law, you will be subject to penalties *by virtue of the* penal code." The Bankruptcy Code illustrates this. For example, section 302(a) provides that "[t]he commencement of a joint case *under* a chapter of this title constitutes an order for relief *under* such chapter." 11 U.S.C. § 302(a). In context, this means "[t]he commencement of a joint case *subject to the provisions of* a chapter of this title constitutes an order for relief *in* such chapter."

Third, as suggested above, Congress plainly does not use the term "under" throughout the Code exclusively to mean "authorized by." For example, in section 111, an agency that provides credit counseling to

debtors is required to meet "the standards set forth *under* this section." 11 U.S.C. § 111(b)(4)(A) (emphasis supplied). In context, this means the agency is required to meet "the standards set forth *in* this section." It plainly does not mean "the standards set forth *authorized by* this section," because such a substitution would make "set forth" nonsensical. Similarly, section 303(a) provides that "an involuntary case may be commenced only *under* chapter 7 or 11 of this title." 11 U.S.C. § 303(a). In context, this means "an involuntary case may be commenced only *in* chapter 7 or 11 of this title." The term "under" as used in section 303(a) cannot mean "authorized by" -- *e.g.*, "an involuntary case may be commenced only *authorized by* chapter 7 or 11 of this title" -- because section 303(a) itself authorizes involuntary cases, and the provisions of chapter 7 or 11 do not. Likewise, section 343 provides that "[t]he debtor shall appear and submit to examination *under* oath at the meeting of creditors." 11 U.S.C. § 343 (emphasis supplied). In context, this means "[t]he debtor shall appear and submit to examination *subject to an* oath at the meeting of creditors." It does not mean ""[t]he debtor shall appear and submit to examination *authorized by an* oath at the meeting of creditors."

As the Court has explained, once it is demonstrated that the same term used in the same act has different meanings depending on the context in which it is used, "the term standing alone is necessarily ambiguous and each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dis-

pute." *Robinson*, 519 U.S. at 343-44. Such is the case here.

Further, substituting "authorized by" for "under" in section 1146(a) simply does not answer the question whether the transfer must occur before or after a plan is confirmed. It is perfectly plausible that a transfer can be "authorized by" a plan that is not confirmed until *after* the transfer. In *Hechinger*, the majority thought that this was not possible because of the way in which it construed the concept of "authorization." The majority reasoned that a transfer prior to confirmation was not conducted under the "authority" of a plan, but, rather, under the "authority" of section 363 of the Bankruptcy Code. *See* 11 U.S.C. § 363(b). Therefore, the majority concluded, until confirmation of a plan occurred, the transfer could not be "under" the plan. The majority reasoned that, following confirmation, however, transfers may be conducted under the "authority" of the plan, and therefore are "authorized by" the plan. *Hechinger*, 335 F.3d at 252. This reasoning has at least three weaknesses.

First, as noted, the term "under" does not necessarily mean "authorized by." But even assuming that it does, the fact that section 363 permits sales of assets prior to confirmation does not mean that these sales are not also "authorized by" a plan. It simply means that they are not "authorized by" a plan that has been confirmed at the time of the sale. The Bankruptcy Code does not permit the sale of assets willy nilly during the chapter 11 proceedings prior to plan confirmation. *See Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d

1063, 1069, 1071 (2d Cir. 1983). Rather, there must be a good business reason behind the sale (hence the requirement of bankruptcy court approval in section 363(b)), *see id.* at 1071, and, frequently, the reason will be (as in this case) because the sale is a necessary component of a plan even though the plan has yet to be confirmed. In that sense, a sale prior to confirmation may be "authorized by" a plan in the sense of being "justified" by the plan, which is simply an alternative definition of "authorized." AMERICAN HERITAGE DICTIONARY 89 (1976) ("To be sufficient grounds for; justify").

Second, sales conducted pursuant to the terms of a confirmed plan are authorized *by statute* no less than sales conducted under section 363(b) that occur prior to confirmation. Section 1141 authorizes compliance with a confirmed plan, and, following confirmation, section 1142 directs the debtor or other party responsible for implementing the plan to "carry out the plan." 11 U.S.C. §§ 1141, 1142(a). Accordingly, in both instances (*i.e.*, sales pre- and post-confirmation), there may be a "plan" and, separately, a statute or statutes "authorizing" the sale. The only difference is that in one instance the plan has not yet been confirmed, and in the other it has. In both situations, the ultimate authority is statutory, and the fact that sales conducted prior to confirmation are "authorized" by a statute is therefore a distinction without a real difference.

Third, as suggested above, the majority interpretation in *Hechinger* of the term "under" turns, in fact, on a definitional gloss imposed on yet another definitional gloss. Specifically, even if the term "under"

means "authorized by," this begs the question what the phrase "authorized by" means. Like the term "under," the term "authorized" has many meanings, including "to be sufficient grounds for," or "justify." AMERICAN HERITAGE DICTIONARY 89 (1976). As noted, a plan may "justify" a sale both before and after confirmation (*e.g.*, before confirmation by supplying a reason for it, and after confirmation by directing that it be done, which direction can be enforced under section 1142).

In *Hechinger*, the majority reasoned further that substituting the phrase "authorized by" for the term "under" would be consistent with the use of a similar phrase appearing in section 365(g)(1). 335 F.3d at 254. But this reference also does not dispel the ambiguity of section 1146(a) for two reasons.

First, section 365(g)(1) merely describes the effect of the rejection of an executory contract or unexpired lease in a bankruptcy case. *E.g., Eagle Ins. Co. v. BankVest Capital Corp. (In re Bankvest Capital Corp.)*, 360 F.3d 291, 295-96 (1st Cir. 2004); *see also NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522 (1984) (explaining concepts of assumption and rejection). Section 365(g)(1) provides that rejection constitutes a "breach" of the contract or lease as though the breach had occurred immediately before the debtor commenced its bankruptcy case, *unless* the debtor assumed the contract during the course of the bankruptcy proceeding under section 365 or "under a plan confirmed under chapter . . . 11." 11 U.S.C. § 365(g)(1); *see also BankVest*, 360 F.3d at 295-96.

Read carefully and in context, the phrase "*under* a plan confirmed under chapter . . . 11" in section 365(g)(1) does not mean "*authorized by* a plan confirmed under chapter . . . 11." Critically, the authorization for the assumption of a lease under a plan is described in section 1123(b)(2), which, in turn, *circles back to section 365*. Specifically, section 1123(b)(2) provides that "a plan may . . . *subject to section 365 of this title*, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section." 11 U.S.C. § 1123(b)(2) (emphasis supplied). Thus, although a plan may "provide for" assumption of an executory contract or unexpired lease, the ultimate "authority" for assumption -- whether prior to confirmation without a plan or as part of confirmation under one -- remains the same: section 365. Read in context, the phrase "plan confirmed under chapter . . . 11" appearing in section 365(g)(1) merely serves to describe one of the *vehicles* for the assumption election (*e.g.*, designation that the contract or lease is assumed in a plan). This does not demonstrate a clear dichotomy of "authorizations" between assumptions under section 365 and those under a plan. On the contrary, it more plausibly supports the construction of "*under* a plan" appearing in section 365(g)(1) to mean "*in accordance with* a plan."

Second, unlike sales, which can occur either before or after plan confirmation, the assumption or rejection of an executory contract or unexpired lease must *always* occur before confirmation. The Bankruptcy Code does not permit post-confirmation assumptions or rejections. *Bildisco*, 465 U.S. at 529

("In a Chapter 11 reorganization, a debtor-in-possession has until a reorganization plan is confirmed to decide whether to accept or reject an executory contract, although a creditor may request the Bankruptcy Court to make such a determination within a particular time."). Thus, the phrase "*under* a plan confirmed under chapter . . . 11" appearing in section 365(g)(1) cannot refer to assumptions or rejections occurring after confirmation. Moreover, the reason why section 365(g)(1) distinguishes contracts and leases that are assumed "under a plan confirmed under chapter . . . 11" from those that are assumed under section 365 is simply in recognition that, in chapter 7 cases, there is no plan, and therefore no plan vehicle to elect assumption. *See* 11 U.S.C. § 103(a) (providing that the provisions of chapter 3 of the Bankruptcy Code, including section 365, apply in both chapter 7 and chapter 11 cases).

By analogy, if the phrase "under a plan confirmed under chapter . . . 11" appearing in section 365(a)(1) includes assumptions designated in a plan prior to confirmation, then the phrase "under a plan confirmed under section 1129" appearing in section 1146(a) also includes sales designated in a plan prior to confirmation. This, of course, supports the decision below.

Considered in context with other relevant terms and phrases used throughout the Bankruptcy Code, as well as the various meanings plausibly ascribed to similar terms and phrases employed in the Code's many provisions, section 1146(a) is ambiguous.

B. The Purpose of Section 1146(a) and the Purposes and Structure of the Bankruptcy Code Demonstrate that Section 1146(a) Applies to Pre-Confirmation Transfers.

In resolving statutory ambiguity, it is appropriate to consider the purpose of the relevant provision, as well as the purposes and structure of the larger enactment of which it is a part. *Robinson*, 519 U.S. at 346 (considering the statutory purpose of antiretaliation in resolving whether use of the term "employees" included former employees, as well as the broader context of Title VII in which the term is employed); *see also Dolan v. United States*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."); *Shapiro v. United States*, 335 U.S. 1, 31 (1948) ("we must heed the . . . well-settled doctrine . . . to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen"). In this case, reference to the purpose of section 1146(a), as well as the purposes and structure of the Code as a whole, refute Florida's interpretation. In order to fulfill the purpose of section 1146(a), as well as the purposes and structure of the Code as a whole, the Court should conclude that the phrase "transfer under a plan confirmed under section 1129" means a transfer instrumental to a plan that is confirmed under section 1129, regardless of whether the transfer occurs before or after confirmation.

1. The Purposes of Section 1146(a) and the Bankruptcy Code Support Affirmance.

Although the text of section 1146(a) is ambiguous, its purpose is not: Congress enacted the statute to facilitate the chapter 11 process "through giving tax relief." *Jacoby-Bender*, 758 F.2d at 841; *see also Hechinger*, 335 F.3d at 259 (Nygaard, J., dissenting) ("Section 1146(c) . . . was clearly intended to provide relief to debtors when they were compelled to sell assets under the plan. Our reading of the statute should comport with that intent."); *id.* at 259 n.2 ("We should read 1146(c) to facilitate reorganization, not impede reorganization.").

This is fully consistent with the purposes of the Bankruptcy Code as a whole. As the Court has explained, "two recognized policies underlying Chapter 11 [are] preserving going concerns and maximizing property available to satisfy creditors." *203 North LaSalle St. P'ship*, 526 U.S. at 453; *see also Toibb*, 501 U.S. at 163 ("Chapter 11 also embodies the general Code policy of maximizing the value of the bankruptcy estate"); *Bildisco*, 465 U.S. at 527 ("the policy of Chapter 11 is to permit successful rehabilitation of debtors").

The imposition of a stamp tax on a transfer from a bankruptcy estate is not a tax incident to the debtor's conduct of a business, such as a sales tax or an income tax. Rather, it is simply a tax on the bankruptcy process itself. Moreover, it is a tax that both makes the disposition of property more expensive and reduces the amount of funds available to

satisfy the claims of creditors. Not surprisingly, Congress enacted section 1146(a) to unfetter the disposition of property in the chapter 11 context from the burden of a tax of this kind.

In light of this reality, Florida's argument that section 1146(a) prescribes a tax exemption exclusively for post-confirmation transfers not only contravenes the purpose of section 1146(a) and the broader purposes of the Code, it simply makes no sense. It is implausible that Congress would have intended the anomaly that a transfer essential to a plan that occurs two minutes before confirmation may be taxed, but the same transfer occurring two seconds after may not. Accordingly, the Court should reject Florida's interpretation. *See Panetti v. Quarterman*, 127 S. Ct. 2842, 2854 (2007) (stating that the "purposes [of a statute] and the practical effects of our holdings [] should be considered when interpreting" a statute) (citing *Castro v. United States*, 540 U.S. 375, 380 (2003) (describing Court's resistance to an "interpretation of the statute that would 'produce troublesome results' [and] 'create procedural anomalies.'")); *Nixon v. Missouri Mun. League*, 541 U.S. 125, 138 (2004).

Moreover, viewed in light of the purposes of both section 1146(a) and the Code as a whole, Florida's argument generates a result that may be described as "absurd." *In re Chapman*, 166 U.S. 661, 667 (1897) ("nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."); *see Green v. Bock Laundry Mach. Co.*, 490 U.S. 504,

511 (1989) (rejecting interpretation of rule that, because of anomaly that a literal reading would endorse, simply "can't mean what it says") (quotation marks and citation omitted).

Debtors frequently sell property during the course of their chapter 11 cases prior to confirmation of a plan, and they often do so in order to take advantage of the opportunity to obtain the best price for what may be an asset that is declining in value. Stamp taxes are significant. For example, the taxes that Florida sought to impose in *In re T.H. Orlando Ltd.*, 391 F.3d 1287, 1290 (11th Cir. 2004) amounted to $161,425. Here, Florida seeks to charge $39,200 for the sake of recording four simple deeds of transfer (for which a separate recording fee is also required, Fla. Stat. § 28.24). If Florida's interpretation of section 1146(a) were accepted, debtors would face the following choice: (1) forgo a value-maximizing sale that facilitates the chapter 11 process until after confirmation in order to take the tax exemption even though the delay may disadvantage the process, or (2) sell the property prior to confirmation and pay the tax. But there is no reason why Congress would have intended a tax exemption designed to *facilitate* the chapter 11 process to serve as an incentive to impair it. Accordingly, Florida's interpretation should be rejected and the Court should conclude that section 1146(a) applies to transfers instrumental to a plan both before and after confirmation.

2. The Structure of the Bankruptcy Code Supports Affirmance.

As noted, the goal of every chapter 11 case is the formulation and confirmation of a negotiated plan providing for the disposition of the debtor's property and the payment of claims. As the text of the Bankruptcy Code itself recognizes, a plan is not something that springs into existence at the point of confirmation. Rather, it is a work created over time that provides a framework for the disposition of the debtor's property and the payment of claims. Critically, the Code refers repeatedly to a "plan" long before the confirmation process even begins.

For example, section 1121(a) provides that a debtor may file a "plan" along with its petition in bankruptcy. 11 U.S.C. § 1121(a). Further, the Code provides that one of the powers of a creditors' committee is to "participate in the formulation of a plan." 11 U.S.C. § 1103(c)(3). The Code also provides that, once a plan has been filed, it may be modified at any time prior to confirmation. 11 U.S.C. § 1127(a). After confirmation, a plan may also be modified, provided that the plan has not been substantially consummated and the other statutory requirements of section 1127(b) are satisfied. 11 U.S.C. § 1127(b); *see also* 11 U.S.C. § 1101(2) (defining phrase "substantial consummation"). Thus, not only does the Code contemplate the concept of a plan as a work in progress, it also provides expressly that confirmation is not monolithic because even the terms of a confirmed plan may be altered under the statutory scheme.

In this case, Piccadilly and its creditors essentially completed negotiation of the critical features of the plan -- the sale of Piccadilly's assets and the distribution of the proceeds to creditors -- prior to the actual court-approved sale of the assets to PI on March 16, 2004. JA 81A; PA 37A. As the bankruptcy court determined, a sale of the assets free and clear was essential for a sale to occur -- *i.e.*, no buyer would be willing to purchase the assets if encumbered with Piccadilly's $160 million in debt. JA 35a. As is customary in bankruptcy, the court ordered all claims and interests to be channeled "to the proceeds of the sale." JA 39a. The parties resolved the difficulty of how to divide the proceeds through the Global Settlement. JA 81a-83a. Obviously, without the sale, there would be no proceeds to divide.

The bankruptcy court determined that Piccadilly had "sound business reasons" for conducting a prompt sale of its assets, and those reasons apply to many chapter 11 debtors suffering from acute financial distress. Once Piccadilly decided that its best option was to sell its assets expeditiously, it acted promptly to avoid the value-destroying consequences of further decline. It formed its plan, reached agreement with its creditors over its essential terms, sold its assets at the highest price it could obtain, and then confirmed its plan.

For purposes of interpreting section 1146(a), Florida's insistence that the statute applies only to transfers that occur after confirmation elevates an incomplete conception of the form of the process over its substance. As Florida itself stated below, "the actual sale itself contemplated the liquidating plan." PA

17a. As the bankruptcy court concluded, the sale and the plan "were so interwoven that one could not proceed without the other." PA 40a. Without a sale in this case, there could have been be no confirmed plan that maximized the value of Piccadilly's property and provided the best distribution to creditors. As the bankruptcy court also found, the sale "was necessary to the consummation of the confirmed Plan because the sale of [Piccadilly's] assets generated the proceeds required to fund the Plan." *Id.*

The court of appeals declined to define the precise standard governing when a "transfer" is sufficiently related to "a plan confirmed under section 1129" such that it constitutes a "transfer under a plan" within the meaning of section 1146(a). PA 8a-9a. In light of the analysis conducted above, however, Piccadilly submits that the better interpretation of the phrase "transfer under a plan confirmed under section 1129" is transfer instrumental to a plan that is confirmed under section 1129, regardless of whether the transfer occurs before or after confirmation. This interpretation recognizes an appropriate connection between the transfer and the confirmed plan, and is consistent with the structure of the chapter 11 process and its policy, as well as the purpose of section 1146(a) itself. In this case, the findings of the bankruptcy court -- which Florida has not challenged -- demonstrate that the sale was not only instrumental

to the plan, it was necessary to the plan and interwoven with it. Accordingly, section 1146(a) applies.[7]

C. The History of Section 1146(a) Supports the Conclusion that the Section Applies to Pre-Confirmation Transfers.

The history behind section 1146(a) also supports affirmance. Section 1146(a) (formerly section 1146(c) renumbered in 2005), descends from section 77B(f) of the Bankruptcy Act of 1898. *995 Fifth Ave. Assocs., L.P. v. New York State Dep't of Taxation & Fin. (In re 995 Fifth Ave. Assocs., L.P.)*, 963 F.2d 503, 510 (2d Cir. 1992). Added in 1934, section 77B(f) prescribed an exemption only from certain enumerated provisions of federal tax law. *Id.* at 510.

In 1938, Congress overhauled the Act, adding Chapter X to replace the former corporation reorganization provisions of section 77B. Section 267, applicable in Chapter X cases, broadened the exemption to include state stamp taxes and provided: "The issuance, transfer, or exchange of securities, or the

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[7] It is also plausible to interpret the phrase "transfer under a plan confirmed under section 1129" to mean "transfer in accordance with a plan that is confirmed under section 1129," regardless of whether the transfer occurs before or after confirmation. This is a somewhat broader standard embracing the alternative reading discussed in *Hechinger*. The Court, however, need not choose between this standard and the one discussed above in order to affirm, as the Court below addressed only Florida's argument that pre-confirmation transfers *never* qualify under the statute. Further, given the bankruptcy court's finding that transfers at issue here were critical to the plan, they would qualify under either standard.

making or delivery of instruments of transfer under any plan confirmed under this chapter, shall be exempt from any stamp taxes now or hereafter imposed under the laws of the United States or of any State." 11 U.S.C. § 667 (1938) (repealed in 1978). Congress enacted the provision over the objection of the Assistant General Counsel of the Treasury Department, who testified that stamp tax obligations are typically small and therefore no great burden on the bankruptcy process, and, if enacted, the exemption would impose an undue burden on governmental authorities obligated to determine whether the exemption applied to a particular transfer. *Revision of the National Bankruptcy Act: Hearings on H.R. 8046 Before the S. Comm. on the Judiciary*, 75th Cong. 139 (1938) (statement of Arthur H. Kent, Assistant General Counsel, Treasury Department). Congress presumably disagreed.

In any event, Florida can hardly complain that application of section 1146(a) to sales under a plan prior to confirmation is impracticable. As noted, a current Florida regulation mirrors the Eleventh Circuit's decision in this case (as well as that of other courts) and provides: "Transfer in Bankruptcy: Sale of real property by trustees, debtors or receivers in federal bankruptcy proceedings is subject to tax unless the transfer is made pursuant to a plan confirmed under § 1129 of the Bankruptcy Code, is a precondition or essential to the confirmation of the plan, or is necessary to consummate or implement a confirmed plan and the debtor is a party to the transfer." Fla. Admin. Code Ann. R. 12B-4.014(15) (citing cases). In addition, the practice in chapter 11 is for

the debtor to ask the bankruptcy court to determine, on notice to the relevant taxing authority, that section 1146(b) exemption applies to a particular transfer, as happened in this case. PA 12a. This alleviates any interpretive burden on filing clerks.

In 1970, Congress appointed a commission to study and report on revisions to the nation's bankruptcy laws. In its 1973 report, the commission recommended the following text: "The issuance, transfer or exchange of securities, or the making or delivery of instruments of transfer under any plan confirmed under this chapter, shall not be taxable under any law of the United States, a state, or any subdivision thereof, imposing a stamp or similar tax." REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, 93d Cong., 1st Sess. pt. II, § 7-315, at 258 (1973). The report notes that the proposed text "is derived from § 267 of the present Act, but broadened to cover all taxes similar to stamp taxes." *Id.* at 260 n.2.

In a 1976 hearing on proposed amendments to the bankruptcy laws held before the Committee on the Judiciary, the Commissioner of the Internal Revenue Service stated that the stamp tax exemption was "of diminished importance insofar as federal revenues are concerned since the Excise Tax Reduction Act of 1965 repealed the stamp taxes on the issuance and transfer of stocks and bonds and the conveyance of realty." *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the H. Comm. on the Judiciary*, 94th Cong. 1974 (1976) (statement of Donald C. Alexander, Commissioner of Internal Revenue Ser-

vice). The Commissioner reported that the IRS did not oppose the proposal. *Id.*[8]

Congress enacted section 1146(a) (originally codified as 1146(c)) as part of its enactment in 1978 of the current Bankruptcy Code. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 1146(c) (1978). The House Report accompanying the Code explains that "[s]ection 1146(c) [now 1146(a)] of title 11 is modeled after section 267 of the Bankruptcy Act which exempts any security or transfer instrument dealt with under a confirmed Chapter X plan from any state or federal stamp tax." H.R. Rep. No. 95-595, at 281 (1977), *reprinted in* 1978 U.S.C.C.A.N. 6238. Significantly, the report continues: "Section 1146(c) [now 1146(a)] *broadens* the exemption to any stamp tax or similar tax on a security or a *transfer instrument dealt with under the consolidated chapter 11.*" *Id.* (emphasis supplied).

The report is significant because it reveals an intent to broaden the scope of the exemption. Further, although the report recites that section 267 exempted transfers from stamp taxes "under a confirmed Chapter X plan," it states that section 1146(a) exempts "a transfer instrument dealt with under the

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[8] The reference to the Excise Tax Reduction Act of 1965, Pub. L. No. 89-44, 79 Stat. 136 (1965), helps explain Congress's purpose behind its retention of the stamp tax exemption in section 1146(a). The legislative materials to the 1965 Act reveal that Congress intended to eliminate most federal excise taxes, including stamp taxes, as archaic, regressive, counterproductive, and unduly burdensome. H.R. Rep. No. 89-433 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1645, 1655-56.

consolidated chapter 11" without mentioning plan confirmation at all, let alone as a precondition to application of the exemption to the transfer. If anything, this supports the view that transfers that occur prior to confirmation are included within the scope of the exemption as transfers dealt with as part of the "chapter 11" case.[9]

D. Relevant Canons of Construction Bolster the Conclusion that Section 1146(a) Applies to Pre-Confirmation Transfers.

Unlike other sections of the Bankruptcy Code that contain express temporal restrictions, section 1146(a) does not. Florida asks the Court to recognize one anyway. Florida's request is unsound. Courts do not have "carte blanche to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do." *United States v. Locke*, 471 U.S. 84, 95 (1985).

Critically, Florida's interpretation of section 1146(a) fails to recognize the distinct language of the section in sharp contrast with the text of other sections of the Code that plainly incorporate temporal distinctions. This difference is entitled to deference,

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[9] The reference to "consolidated" chapter 11 is apparently a reference to the fact that, in enacting chapter 11, Congress consolidated into chapter 11 the three prior reorganization chapters in existence under the Bankruptcy Act of 1898: Chapter X mentioned above, Chapter XI governing business arrangements, and Chapter XII governing real estate arrangements. *See Toibb*, 501 U.S. at 167 n.5 (Stevens, J., dissenting) (quoting S. Rep. No. 95-989, pp. 9-10 (1978), discussing replacement of Chapters X, XI, & XII with chapter 11).

Russello, 464 U.S. at 23, and there is no reason to disregard it.

As the Court has noted, temporal restrictions on relief, particularly time limitations, are inherently arbitrary. *Locke*, 471 U.S. at 94 ("[d]eadlines are inherently arbitrary") (quotation marks and citation omitted). That is all the more true when created artificially without clear statutory direction. In the bankruptcy context, this Court has refused time and again to imply limits on statutory bankruptcy relief where Congress has not prescribed an express limitation. *See, e.g.*, *NextWave*, 537 U.S. at 302; *Toibb*, 501 U.S. at 161. There is no reason to depart from that practice in this case.

The Court's analysis in *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991), is particularly instructive. There, the Court interpreted 38 U.S.C. § 2024(d), which grants certain employees the right to obtain civilian reemployment following military service. The Court observed that, unlike other parts of the same statute that set forth express time limits on the duration of similar statutory protections, section 2024(d) prescribed none. Citing the principle that a "statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context," the Court declined to import a temporal restriction into section 2024(d). 502 U.S. at 220-21. As noted, Congress has placed express temporal restrictions in numerous sections of the Code. *E.g.*, 11 U.S.C § 1127(b) (permitting certain plan modifications "at any time after confirmation of such plan"). The fact that section 1146(a) contains no similar pro-

vision demonstrates that Congress did not intend one to exist there.

Moreover, as the Eleventh Circuit recognized, "a remedial statute such as the Bankruptcy Code should be liberally construed." PA 8a; *cf. Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782 (1952) (reform legislation in favor of seamen "is largely remedial and calls for liberal interpretation in favor of the seamen"). With this in mind, it is important not to lose sight of Florida's ultimate objective: to have its claim for stamp tax liability allowed and paid as a priority expense of administration ahead of the claims of almost every other creditor. As the Court has stated recently, the Code's priority provisions should be strictly construed. *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 126 S Ct. 2105, 2116 (2006) ("provisions allowing preferences must be tightly construed"). That rule has all the more force where, as here, the governing statutory scheme plausibly excludes Florida's claim in its entirety from *any* distribution. As the Court explained in *Howard Delivery*, "[e]very claim granted priority status reduces the funds available to general unsecured creditors and may diminish the recovery of other claimants qualifying for equal or lesser priorities." *Id.* Thus, "[t]o give priority to a claimant not clearly entitled thereto is not only inconsistent with the policy of equality of distribution; it dilutes the value of the priority for those creditors Congress intended to prefer." *Id.* (quotation marks and citation omitted).

Further, in order to confirm a chapter 11 plan, a debtor must pay all administrative expenses in cash in full. 11 U.S.C. § 1129(a)(9)(A). Unquestionably,

imposing a stamp tax liability as an expense of administration will make the chapter 11 process that much more difficult, which, as noted, is contrary to the purpose of section 1146(a).

Florida contends that several canons of statutory construction favor its interpretation. *See* Pet. Br. 26-29. In particular, it invokes the concept that statutes prescribing tax exemptions must be "strictly construed" against the exemption. Pet. Br. 27 (citing *Nat'l Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582, 590 (1995)); *see also Hechinger*, 335 F.3d at 254 (citing cases).

But "[c]anons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction." *Circuit City Stores v. Adams*, 532 U.S. 105, 115 (2001). In this case, there are compelling reasons to disregard the canons that Florida invokes.

First, section 1146(a) clearly describes a tax exemption. Thus, it is already clear that Congress intends to disrupt state taxation schemes. Likewise, it is perfectly clear that chapter 11 debtors are entitled to the benefit of the exemption. The only issue is whether section 1146(a) contains a temporal limitation that debtors must adhere to in order to claim the exemption (i.e., whether debtors must wait to close transfers after confirmation rather than before). Employing the canons of strict construction that Florida invokes to imply a temporal limitation where none is expressly supplied overstates the office of these canons. While perhaps useful to illuminate meaning in appropriate cases, Florida employs them

improperly to add restrictions to the text that do not already exist.

Second, canons are intended to discern legislative purpose, not thwart it. In this case, Florida seeks to invoke the canons of strict construction that it cites to perpetuate an anomalous result at odds with Congress's purpose of providing tax relief to facilitate the chapter 11 process. That is unwarranted. As Judge Nygaard observed in his dissent in *Hechinger*, even if tax exemptions are to be strictly construed, that does not mean a court should "abrogate the purpose of the exemption through too narrow an application." *Hechinger*, 335 F.3d at 259 (Nygaard, J., dissenting).

The Court's analogous decision in *Dolan v. United States*, 546 U.S. 481 (2006), is instructive. Invoking the canon that "a waiver of a Government's sovereign immunity will be strictly construed," the United States urged the Court to construe generously the exceptions to waiver of immunity set forth in section 2680 of the Federal Tort Claims Act ("FTCA"). Rejecting this argument, the Court concluded that the canon was "unhelpful" in construing the statute because "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute," which waived immunity "in sweeping language." *Id.* at 491-92 (quotation marks and citation omitted). The same reasoning applies here.

The central purpose of section 1146(a) is to prescribe a tax exemption, and the statute so provides. Again, the only issue is whether to graft a temporal restriction on the statute's text. Applying a canon of strict construction to accomplish this result in such a

context would be contrary to the exemption's clear purpose. As in *Dolan*, the Court should conclude that "the proper objective of a court attempting to construe [the statute] is to identify those circumstances which are within the words and reason of the exception -- no less and no more." *Id.* (quotation marks and citation omitted).

Finally, the Court's decision in *California State Board of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989), is not to the contrary. There the Court considered whether, as a constitutional matter, the administration of a bankruptcy estate is entitled to the shield of intergovernmental tax immunity. The Court concluded that "[a]bsolute tax immunity is appropriate only when the tax is on the United States itself, or an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities." *Id.* at 849 (quotation marks and citation omitted). Concluding that the administration of a bankruptcy estate does not fall within this definition, the Court held that the constitutional doctrine does not bar a State from taxing a debtor in possession in bankruptcy.

Turning to the question whether the bankruptcy laws exempted the debtor, the Court considered 28 U.S.C. § 960(a). By its terms, section 960(a) applies to "officers and agents conducting any business under authority of a United States Court," and specifically permits the imposition of state and local taxes "applicable to such business to the same extent as if it were conducted by an individual or corporation." *Id.* Recognizing that section 960 expressly author-

izes taxation only on *operating* businesses, courts had construed the provision, by negative implication, as denying the ability to tax the non-operating liquidation of assets in bankruptcy. Stating that "[a] court must proceed carefully when asked to recognize an exemption," *id.* at 851-52, the Court found that such inferential reasoning did not constitute a sufficiently "clear expression of an exemption from state taxation" to warrant overriding a state's authority to tax, *id.* at 852. The instant controversy is entirely different.

In this case, section 1146(a) clearly proscribes the imposition of stamp taxes and demonstrates Congress's intent to exempt a category of state taxation. Moreover, section 960(b) itself provides that, although an operating bankruptcy estate must generally pay accrued taxes, there is an exception if "payment of the tax is excused under a specific provision of title 11." 28 U.S.C. § 960(b)(2). Section 1146(a) is precisely such a specific provision.

Unlike the situation in *Sierra Summit*, there is no call in this case to "recognize" an exemption that exists only vaguely or appears only through inferential reasoning -- section 1146(a) plainly establishes the exemption. The only issue is whether to graft onto that exemption the temporal restriction that Florida proposes. For all the reasons discussed above, the Court should reject Florida's invitation.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

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REPLY BRIEF

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STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Petitioner,

v.

PICCADILLY CAFETERIAS, INC.,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY ARGUMENT

Piccadilly sidesteps the key strengths of the most natural reading of section 1146(c), which is to limit stamp tax exemptions to only those post-confirmation transfers authorized under a confirmed Chapter 11 plan. It leaves the Department's arguments largely unanswered, devoting much effort trying to establish that section 1146(c) is sufficiently unclear to justify embarking on the voyage that follows through the general purpose, structure and history of various portions of the Bankruptcy Code. All of this, Piccadilly claims, supports its newly-proposed "instrumental" test for determining post-confirmation whether a pre-confirmation tax exemption should have been granted in the first place.

Piccadilly briefly addresses canons of statutory construction, but ignores the principle that Congress was presumed to be aware of and to have adopted the rationales of the *Hechinger* and *NVR* decisions when it readopted and renumbered section 1146(c) in 2005 without change. It also disregards the context of section 1146(c)'s placement in the Code's subsection entitled "POST-CONFIRMATION MATTERS." In Piccadilly's view, liberality in the interpretation of the Bankruptcy Code takes priority over the natural reading of section 1146(c) and trumps other relevant canons of construction, justifying an extraordinary grant of power to bankruptcy judges to exercise judicial prescience by granting contingent tax exemptions prospectively without the necessity of a confirmed plan as section 1146(c) requires. This Court has never accorded the Bankruptcy Code such elasticity, particularly in the context of a tax exemption statute; it should not do so in this case.

A. The Most Natural Reading of Section 1146(c) Does Not Support the Eleventh Circuit's or Piccadilly's Conclusion that Pre-Confirmation Transfers Under Preliminary Unconfirmed Plans Are Entitled to Stamp Tax Exemptions.

The most natural reading of section 1146(c) is that it applies to post-confirmation transfers under a confirmed Chapter 11 plan. Piccadilly makes no claim that section 1146(c) can be read to exclude such transfers. Instead, Piccadilly seeks to go beyond this simple, natural, and workable reading of section 1146(c) to inferentially include pre-confirmation transfers. Its burden of persuading this Court is "exceptionally heavy." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 9 (2000).

Yet, Piccadilly spends over half its argument (Resp. Br. 23-40) trying to create sufficient ambiguity[1] to justify a trip through the nooks and crannies of the

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[1] For instance, Piccadilly suggests that "in accordance with" and other phrases could plausibly substitute for "under" to expand one's reading of section 1146(c) to apply to pre-confirmation transfers. Resp. Br. 28, 33-34. It would be peculiar, however, to talk about doing some act "in accordance with" something that does not yet and may never exist; such a construction is awkward. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 450 (1999) (noting "it would be exceedingly odd to speak" in the proposed manner of statutory construction). Piccadilly also claims that Congress could have clarified that only post-confirmation transfers are eligible by using the "temporally limiting phrase 'dealt with under a confirmed plan'" used elsewhere in the Code. Resp. Br. 30. The addition of "dealt with" adds nothing because Piccadilly undoubtedly would claim that a pre-confirmation transfer listed in a confirmed plan is thereby "dealt with" by the plan and entitled to the exemption.

Bankruptcy Code and the section's sparse legislative history in search of its true meaning. The most natural reading of section 1146(c) makes this journey unnecessary; and the journey, if taken, leads back to the conclusion that the Eleventh Circuit's expansive view is insupportable, and that the courts in *In re Hechinger Inv. Co. of Delaware, Inc.*, 335 F.3d 243 (3d Cir. 2003), and *In re NVR, LP*, 189 F.3d 442 (4th Cir. 1999), correctly limited section 1146(c) to only post-confirmation transfers.

A tax exemption under section 1146(c) hinges on the existence of an actual confirmed plan under section 1129 of the Code. A confirmed plan is the *sine qua non* of section 1146(c)'s operation, triggering the availability of its stamp tax exemption. In Piccadilly's view, however, section 1146(c) empowers bankruptcy courts to grant *tentative* tax relief *prospectively* based on a *preliminary*, *unconfirmed* plan that contains an asset transfer a debtor hopes the court will deem to have been "instrumental" to the plan the court might eventually confirm. This view stretches section 1146(c)'s language too far.

It is implausible that Congress intended the word "plan" in section 1146(c) to mean a preliminary, unconfirmed plan. To do so disengages the word "plan" from its adjacent modifier "confirmed," rendering the latter irrelevant. This reading ignores that the linchpin of section 1146(c) is a "plan confirmed under section 1129" of the Code. Proposed plans routinely are amended, often significantly; competing plans may be proposed. A plan proposed prior to confirmation is merely a preliminary proposal; it has no imprimatur of approval until it successfully runs its course through the confirmation process, if ever.

That a proposed plan might later be confirmed in its entirety or even with what Piccadilly terms its "instrumental" parts intact is possible. But that possibility does not justify giving power to bankruptcy courts to grant contingent pre-confirmation tax exemptions. To do so would thwart the laudable purpose of the plan confirmation process itself, which Congress has painstakingly structured to provide fairness to affected parties in its sequential steps: plan formulation, disclosure statement, solicitation of votes, voting, confirmation hearing, and plan confirmation. The grant of a tax exemption, as was done below, based solely on an asset sale done "in contemplation of a plan" and outside the plan confirmation process renders the "plan confirmed" language of section 1146(c) meaningless.

Such power would be extraordinary because it would be based on the *assumption* that: (a) the case will not be dismissed or converted to a Chapter 7 liquidation; (b) a Chapter 11 plan will be proposed, will conform to the requirements of the confirmation process, and will eventually be confirmed; (c) a competing plan will not prevail; *and* (d) the transfer at issue ultimately will be deemed "instrumental" (or some other non-statutory test) to the final plan that is ultimately confirmed. All this is far too much to assume. If any of these contingencies occur (and the likelihood is high that one will),[2] the grant of the tax

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[2] Available data reflects that approximately 74-83% of Chapter 11 cases do not result in confirmed plans, most converting to Chapter 7 liquidations or resulting in dismissal. *See generally* Gordon Bermant & Ed Flynn, Outcomes of Chapter 11 Cases: U.S. Trustee Database Sheds Light on Old Questions, 17 AM. BANKR. INST. J. 8 (1998) (reviewing database of U.S. Trustees for period 1989-1995).

exemption at this preliminary, pre-confirmation stage of a Chapter 11 proceeding will be for naught; the exemption will be unjustified and have to be undone. The exercise of such power would require a crystal ball to foresee that none of these possibilities will arise, thereby undermining the plausibility of Piccadilly's reading of section 1146(c).

The simplicity and workability of the decisions in *Hechinger* and *NVR* contrast sharply with the Eleventh Circuit's approach, which raises unanswered ancillary questions such as: (a) how are unjustified pre-confirmation tax exemptions to be corrected later if, for example, no plan is confirmed, the case is converted, or the petition is dismissed?; (b) how are state and local governments to know of each proposed transfer (whether under section 363 or simply in the ordinary course of a debtor's business) to protect their interests?; and (c) what are the administrative and judicial costs of unraveling unjustified tax burdens? Indeed, one must question whether the litigation costs of the parties objecting to and defending requests for pre-confirmation tax exemptions, together with post-confirmation litigation under one of the fact-driven tests proposed (discussed in next paragraph), may quickly eclipse the amount of the tax.

It is unlikely that Congress meant to spawn all these practical difficulties that flow from the Eleventh Circuit's broad reading of section 1146(c). Moreover, the court's approach requires inventing a judicial test for determining *post-confirmation* whether a *pre-confirmation* transfer was justified. Tests abound.[3]

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[3] Piccadilly's new test is that a pre-confirmation exemption is justified if the asset transfer was part of a preliminary plan and the transfer is later deemed to be "instrumental" to the plan (Continued ...)

Each is based on a subjective and malleable view of the importance of a pre-confirmation asset transfer (was it "instrumental," "necessary," or just "material" to the plan eventually confirmed?), enmeshing the courts in a non-textual endeavor fraught with practical difficulties and administrative burdens. *See 203 N. LaSalle St. P'ship*, 526 U.S. at 450 (noting "practical" difficulties with reading a bankruptcy statute in a non-textual way that leads to malleable characterizations such as "substantial," "significant," or "considerable" that lack sharpness). None of these proposed tests has textual support in section 1146(c), whose most natural reading eliminates the need for any of them.

B. The Purpose, Structure, and History of the Code Support the Department's Reading of Section 1146(c).

Piccadilly invokes the purpose, structure, and history of the Bankruptcy Code (Resp. Br. 41-52), which provide a firmer foundation for the Department's reading of section 1146(c). First, the purpose of 1146(c) is reflected in its text. It provides that debtors who comply with the Chapter 11 confirmation process and achieve a confirmed plan will not have stamp taxes imposed on the making or delivery of instruments of transfer authorized under

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ultimately approved. Resp. Br. 1, 20-23, 47. The Eleventh Circuit held the exemption applies to "*those* pre-confirmation transfers that are necessary to the consummation of a confirmed plan" requiring at least "some nexus between the pre-confirmation sale and the confirmed plan." Pet. App. 8a-9a (emphasis in original). The amici's test is whether the sale is a "material element" of the debtor's business plan, provided "the basis of the plan ultimately confirmed ... is substantially the same as that of the earlier business plan." Prof. Br. 2-3.

the confirmed plan. It provides a narrowly defined *stamp* tax exemption on a limited set of transactions involving *securities and asset transfers* under a *confirmed* plan. It is reasonable to conclude that the purpose of section 1146(c) is to give a very limited tax exemption to those debtors who successfully reach the confirmation stage.

Given the exemption's limited nature, it cannot be characterized as generalized tax relief whose purpose is to benefit debtors or creditors in all types of bankruptcies. It is not available in Chapter 7 liquidation cases or in Chapter 13 matters. It does not extend to other taxes such as sales, income, excise, or capital gains taxes, all of which are larger and would provide greater relief if exempted. Instead, section 1146(c)'s prohibition against taxation is triggered only upon completion of the Chapter 11 confirmation process, and then only for a limited set of specific transactions involving a stamp or similar transfer tax.

Next, Piccadilly's claim that a stamp tax "is simply a tax on the bankruptcy process itself" is hyperbole. Resp. Br. 42. Stamp taxes are not imposed only when a debtor files for bankruptcy; they are generally applicable taxes, like sales and income taxes, that are due and payable when incurred whether a company has filed for bankruptcy or not. *See Cal. State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 849 (1989) (noting "no constitutional impediment to the imposition of sales or use tax on a liquidation sale."). They are neutral taxes applied to all relevant transactions. The Code allows debtors who believe it is economically justifiable to sell assets within (e.g., *NVR*) or outside the ordinary course of their businesses (e.g., *Hechinger*) to do so prior to confirmation. But, like

other debtors without confirmed plans, they will incur all the ordinary costs of transfer, which may include a stamp tax.

Similarly, it is exaggeration to suggest that the stamp tax itself is an impediment to corporate reorganizations under Chapter 11 when the Code flexibly allows the pursuit of value-maximization in a variety of ways via sales and other competitive dispositions of assets, and further allows an exemption from such a tax upon successful completion of the confirmation process. Congress established flexibility in the filing, modification, and confirmation of a proposed plan. It is not required that a debtor have a fully-negotiated plan ready to go at the outset of filing under Chapter 11. Simple plans can be filed followed by more detailed plans. Timing, to a great extent, is in the hands of the debtor. Given this flexibility and structure, one must question whether the parties would have foregone the $80 million transaction at issue to avoid a $39,200 stamp tax on the four Florida properties at issue. Piccadilly suggests it might forgo such a sale because waiting for confirmation would "disadvantage the process." Resp. Br. 44. But section 1146(c) speaks in terms of a completed plan confirmation process, which Piccadilly's approach strips of meaning.

Further, Piccadilly's claim that the Department seeks to impose a "temporal limitation" overlooks the statute's language and tenses, its subheading ("POST-CONFIRMATION MATTERS"), and its requirement of a confirmed plan. The language of section 1146(c), taken as a whole, itself expresses a temporal limitation. The past tense of "confirmed" establishes that a tax exemption cannot exist until a confirmed plan exists. Read Piccadilly's way, section 1146(c)

would allow transfers to avoid tax before a "confirmed" plan exists thereby rendering the word "confirmed" irrelevant. In reality, it is Piccadilly who seeks to *eliminate* the temporal limitation of a "confirmed plan," which is the statute's sequential triggering mechanism. Only after the successful completion of the confirmation process and confirmation of a plan do the statute's tax exemptions become operative.

Next, Piccadilly claims that it is "absurd" and an "anomaly" to read section 1146(c) as did the courts in *Hechinger* and *NRV*. The holding of those courts, consistent with the Department's position in this case, is simple: section 1146(c) creates a bright line by providing that transfers flowing from a confirmed plan will not be taxed. Putting aside the unrealistic hypothetical of a "crucial" transfer made "two minutes before confirmation" (Resp. Br. 43), what Piccadilly essentially posits is that deadlines, cutoff dates, or other lines of demarcation are inherently absurd and nonsensical. But lines must be drawn, and the language of section 1146(c) requiring "a plan confirmed under section 1129" forms the most natural and commonsense point at which to draw it.

Second, the structure of the Bankruptcy Code supports the Department's reading of section 1146(c). Piccadilly paints a portrait of a company that carefully and methodically invoked the Chapter 11 process, choosing to sell its assets under section 363 before a reorganization plan was even filed. The course that Piccadilly chose in selling its assets was a permissible one under the Code's structure. *But it was entirely outside the structure of the Code's plan confirmation process.* The approval of the sale and the grant of the tax exemption occurred over a month

prior to Piccadilly's filing of its initial proposed plan (and over eight months *prior* to the confirmation order).

Under these circumstances, it is a leap of logic to read section 1146(c), which pivots around the necessity of a "plan confirmed under section 1129," to authorize bankruptcy judges at a preliminary juncture before a proposed plan is even filed to predict that asset transfers are entitled to tax exemptions. As the bankruptcy judge noted, the section 363 sale was merely "in *contemplation* of a plan." Jt. App. 46a (emphasis added). What Piccadilly fails to explain is why its approach, via a preliminary plan and sale entirely outside the plan confirmation process, must control the extent of section 1146(c)'s application. It should not control. As the court in *NVR* concluded, "§1146(c) exclusively, and not a plan's provisions, control the extent of the statute's own operations." 189 F.3d at 456-57.

Finally, Piccadilly claims the exceptionally meager legislative history supports a broad reading of section 1146(c) to apply to pre-confirmation transfers. The scant legislative history establishes only that Congress intended to expand the stamp tax to the states in 1938 and the stamp tax exemption to "similar" taxes in 1978.

No legislative history exists in support of extending the tax exemption to *pre-confirmation* transfers. Piccadilly cites none. Instead, the limited history it cites suggests the contrary. Notably, Piccadilly misconstrues the statement of the Assistant General Counsel of the Treasury Department, Arthur H. Kent, before the Senate Subcommittee of the Committee on the Judiciary on January 21, 1938. *See*

Revision of the National Bankruptcy Act, Hearings Before a Subcommittee of the Comm. on the Judiciary on H.R. 8046, 75th Cong. 132-45 (1937-38) (hereafter *Kent Statement*); Resp. Br. 49.

When the Chandler Act was considered in 1937, it contained three proposed stamp tax exemptions: (a) one for confirmed plans in reorganization; (b) one for "arrangements" involving the treatment of unsecured debt; and (c) one for "arrangements" involving modification of the rights of secured creditors.[4] The Treasury Department protested the extension of the stamp tax to these latter two "arrangements" under a House version of the act because it would expand the exemption's scope broadly, materially increase the administration of the tax, and allow unnecessary and undesirable exemptions.[5] In response, the final version of the

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[4] *See* H.R. REP. NO. 1409, at 111 (§ 267), 126 (§ 365) & 137 (§ 520) (proposed exemptions) & at 120 (§ 306(1)) & 129 (§ 406(1)) (definitions of "arrangements") (1937) (setting forth three proposed exemptions (a) one for confirmed plans in reorganization under Chapter X ("Corporate Reorganizations"); (b) one for "arrangements" involving the settlement, satisfaction, or extension of the time of payment of unsecured debt under Chapter XI (entitled "Arrangements"); and (c) one for "arrangements" involving "any plan altering or modifying the rights of creditors or of any class of them, holding debts secured by real property or a chattel real of which the debtor is the legal or equitable owner" under Chapter XII (entitled "Real Property Arrangements by Persons Other Than Corporations")).

[5] Kent's statement included the January 14, 1938 letter of Roswell Magill, Acting Secretary of the Treasury, which noted the "difficulties of administering the exemption [contained in the House version, which included arrangements] would be materially increased over those arising from administering the stamp-tax provisions of [the Senate version] because under the former the exemptions apply to additional transactions more

(Continued ...)

Chandler Act was modified to *eliminate* its proposed application to these two categories of "arrangements" entirely. S. REP. NO. 1916, at 8-9 (1938). Thus, rather than strengthening Piccadilly's position, this *restriction* on the proposed scope of the stamp tax's application in response to the Treasury Department's statement suggests strongly to the contrary.

Moreover, Piccadilly entirely overlooks that Mr. Kent exclusively addressed the *federal* stamp tax, specifically stating "[w]e are not interested in the *State* aspect of the question." *Kent Statement*, at 139 (emphasis added). The potential administrative or fiscal burdens on the then 48 *states* were simply not addressed and formed no part of this legislative history. Moreover, that the stamp tax was deemed of "diminished importance insofar as *federal* revenues are concerned" (Resp. Br. 50) (emphasis added) (citation omitted) is of little moment given the substantial importance of such revenues to states such as Florida, whose revenues (though currently declining due in part to fewer real property transfers) have ranged from $1.572 billion (FY 2001-02) to $4.058 billion (FY 2005-06) in recent years.[6]

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numerous than under the latter." *Kent Statement*, at 141. His letter noted further that "the language in the stamp-tax exemptions provisions of [the House version] is somewhat indefinite and for this reason may be susceptible of interpretations which would permit exemptions not necessary or desired." *Id.*

[6] *See* Florida Department of Revenue, Documentary Stamp Tax Collections, Historical Data, *available at* http://dor.myflorida.com/taxes/doc_stamp_coll.html (last visited March 13, 2008).

Furthermore, a primary focus of the Treasury Department was its concern about the *post-confirmation* time period for transfers, which it wanted to limit to one year from plan confirmation. The concern was that it might pose administrative burdens if transfers "continued for a period of 5 years after the consummation of the plan" because the "determination of whether they come within the terms of the exception becomes an extremely difficult matter." *Kent Statement*, at 140. While Congress did not impose this suggested limitation, the point is that Mr. Kent's statement focused on *post-confirmation* concerns, not pre-confirmation ones. For all these reasons, Piccadilly's invocation of legislative history undermines rather than supports its position.

C. The "Realities" of Bankruptcy Practice and the "Remedial" Nature of the Code Do Not Trump Statutory Language.

A central theme of Piccadilly and its amici is that the language of section 1146(c) should conform to the "realities" of "modern" bankruptcy practices. Both ask this Court to construe section 1146(c) with flexibility and liberality to reach a result they deem desirable from a policy perspective, a task better suited for Congress. *Hartford Underwriters*, 530 U.S. at 13-14 ("Achieving a better policy outcome—if what petitioner urges is that—is a task for Congress, not the courts.").

What they ignore is the reality that most Chapter 11 filings do not result in confirmed plans, thereby leading to unnecessary administrative burdens arising from the grant of pre-confirmation tax exemptions that must later be undone. They also ignore that the Bankruptcy Code is sufficiently

flexible to accommodate the type of structured, unhurried approach that Piccadilly employed, as well as time-sensitive situations in which value-maximizing competitive sales or auctions are desirable.

Perhaps most importantly, they ignore that real world conduct must conform to the Code and not vice versa. In this regard, while debtors may "favor pre-confirmation sales rather than waiting for confirmation," nothing in the Code requires that debtors must "await the plan confirmation process before selling assets" as is claimed. Prof Br. 19. Debtors may use section 363 to sell assets, as was done below; but a sale under section 363 is not *ipso facto* entitled to a section 1146(c) tax exemption. Section 363 sales may be done for a host of laudable, sound business reasons, but that alone does not entitle them to stamp tax exemptions.

Instead, the Bankruptcy Code has established an orderly, fair, and flexible process, one in which debtors must operate to achieve the equitable goals that Congress intends. But flexibility and equity do not trump the Code; equity in bankruptcy must be achieved within the confines of the Code itself. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988) ("The short answer to these arguments is that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.").

Notably, the amici's view of the Congressional intent underlying section 1146(c) is somewhat remarkable. They assert that "if the current practice of making pre-confirmation sales part of a debtor's program of reorganization had been the practice

decades ago when Congress brought the exemption into bankruptcy reorganization law, it would have intended such sales to be exempt if the basis for the reorganization under the plan confirmed is substantially the same as provided by the debtor's program for reorganization under its earlier business plan." Prof. Br. 3. They similarly assert that this "increase in the usage of pre-confirmation sales in chapter 11 cases, along with the transformation in the bankruptcy process as a whole, is a change of circumstances upon which Congress could not have focused when originally drafting the transfer tax exemption decades ago. Had such circumstances existed when Congress was considering whether to bring the exemption from transfer taxes into the law, it surely would have intended such pre-confirmation sales to be exempt." *Id.* at 19.

What is overlooked is that Congress – if it so intended – had the perfect chance in 2005 to amend and "modernize" section 1146(c) into the type of statute that the amici desire. Congress could have rewritten section 1146(c) to include pre-confirmation transfers and to incorporate a test for determining what pre-confirmation transfers should be eligible for stamp tax exemptions. Congress, however, chose only to readopt section 1146(c) verbatim and to renumber it. The view that this Court should essentially rewrite the statute to bring it into "modern" practice is all the more troubling given that Congress so recently readopted section 1146(c) unchanged with both *Hechinger* and *NVR* on the books.

Notably, neither the Eleventh Circuit nor Piccadilly cite any case in which this Court has held that the "remedial" nature of the Bankruptcy Code trumps the requirement that tax exemptions be

carefully and narrowly construed.[7] None exist. Moreover, the Department does not contest that section 1146(c) establishes a stamp tax exemption, that it applies to post-confirmation transfers, and that it displaces the state's tax system to that extent. It is the far-reaching *inferential* expansion of the exemption to pre-confirmation transfers to which the Department objects, making highly relevant the principle of *California State Board of Equalization v. Sierra Summit, Inc.*, that courts must "proceed carefully when asked to recognize an exemption from state taxation *that Congress has not clearly expressed*." 490 U.S. at 851-52 (emphasis added).

Congress has not clearly expressed a pre-confirmation tax exemption in section 1146(c). Nothing in the plain language of the statute or its legislative history, or the structure of the Bankruptcy Code, provides a clear expression of this intent. *Id.* at 852. As this Court noted in *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 607 (1943), where "Congress intends to prevent" a state from imposing a general non-discriminatory tax, "it should say so in plain words. Such a conclusion cannot rest on dubious inferences." Here, Piccadilly claims that section 1146(c) "plainly establishes" entitlement to pre-confirmation tax exemptions (Resp. Br. 58), yet neither the Eleventh Circuit nor Piccadilly

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[7] Tellingly, neither of the two cases upon which the Eleventh Circuit relied for its conclusion that "remedial" bankruptcy statutes must be liberally construed involved tax exemptions. One merely broadly paraphrased this Court's statement in *Bank of Marin v. England*, 385 U.S. 99, 103 (1966), that "equitable principles govern the exercise of bankruptcy jurisdiction." The other was not even a bankruptcy case. *See* Pet. App. 8a (citing *Matter of Crist*, 632 F.2d 1226 (5th Cir. 1980), and *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926 (11th Cir. 1995)).

can point to the "plain words" that Congress used to establish this entitlement. Indeed, they deem section 1146(c) to be ambiguous, not plain, and rely on the type of doubtful inferences that do not justify further intrusion into state and local tax systems.

D. Piccadilly Miscasts the Department's Position.

Finally, Piccadilly makes two assertions that miscast the Department's position. First, Piccadilly points to a "current" Florida administrative rule, which it characterizes as "implementing" section 1146(c) and "mirror[ing]" the decision in *Piccadilly Cafeterias*. Resp. Br. 16 & 49. Piccadilly fails to note that this regulation is neither current nor binding; does not implement section 1146(c); and was not raised below. The rule is merely a non-binding interpretative statement.[8] It is one of three related rules[9] issued in 1994 but never updated. The rule to which Piccadilly points attempted to interpret section 1146(c) in light of two non-binding cases from 1985,[10]

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[8] *See, e.g., Leadership Housing, Inc. v. Fla. Dep't of Rev.*, 336 So. 2d 1239, 1241 (Fla. App. 1976) (department rule regarding application of documentary stamp tax to existing mortgages "is merely an interpretative rule setting out respondent's position on the point at issue. It is not a substantive rule and has no legislative effect."); *see also Batterton v. Francis*, 432 U.S. 416, 425 (1977) ("... a court is not required to give effect to an interpretative regulation.").

[9] *See* Rules 12B-4.013(19) ("Conveyances Subject"), 12B-4.014(15) ("Conveyances Not Subject to Tax"), & 12B-4.054(30) ("Exempt Transactions"), Fla. Admin. Code (2008).

[10] Rule 4.014(15)'s text includes the following: "(11 U.S.C. Section 1146(c); In re Jacoby-Bender, Inc., 758 F.2d 840 (2d Cir. 1985); In re Smoss Enterprises Corp., 54 Bankr. 950 (E.D.N.Y. 1985)."

and was enacted prior to *NVR* (1999), *Hechinger* (2004), and *In re T.H. Orlando* (2004).[11] It is outdated by over a decade, interprets non-binding cases that are over two decades old, and could not "mirror" *Piccadilly Cafeterias*, which was not issued until 2007. Even if the rule were updated it would necessarily reflect the *Piccadilly Cafeterias* decision because that is the law in the Eleventh Circuit currently. For these reasons, Piccadilly's invocation of a non-binding, out-of-date interpretive regulation proves nothing.

Second, Piccadilly points to claims forms filed by the Department, asserting that "Florida's ultimate objective" is to have its stamp tax "paid as a priority expense of administration ahead of the claims of almost every other creditor." Resp. Br. 54. This assertion is a red herring. If the tax is valid and owed, it receives the priority to which it is entitled under the Code, no more and no less. *See* 11 U.S.C. § 503(b)(1)(B) (granting an administrative expense priority to taxes an estate incurs post-petition). The Department obviously seeks payment of stamp taxes. The payment of such taxes, however, is neither an unjustified priority nor does it make the Chapter 11 process any "more difficult" than does the payment of other justifiable liabilities and other taxes that arise in the course of the process. Resp. Br. 55.

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[11] The statement that the debtor must "be a party to the transfer" is also outdated. *See In re T.H. Orlando Ltd.*, 391 F.3d 1287 (11th Cir. 2004) (extending section 1146(c)'s tax exemption to transfers of *non-debtor* property between two *non-debtors*).

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Eleventh Circuit Court of Appeals.

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AMICUS CURIAE BRIEF

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No. 07-312

IN THE

Supreme Court of the United States

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Petitioner,

—v.—

PICCADILLY CAFETERIAS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN SUPPORT OF RESPONDENT FOR *AMICI CURIAE* PROFESSORS RICHARD AARON, JAGDEEP BHANDARI, SUSAN BLOCK-LIEB, INGRID HILLINGER, LOIS R. LUPICA, C. SCOTT PRYOR, AND KEITH SHARFMAN

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INTEREST OF *AMICI CURIAE*[1]

The *Amici Curiae* are law professors who devote their careers to the study and teaching of bankruptcy law.[2] They are deeply interested in this case because the issue posed, which has divided the courts of appeals, arises in many of the thousands of cases for bankruptcy reorganization filed each year under chapter 11 of the Bankruptcy Code.

This brief is filed by the *Amici* to offer to the Court what assistance they can for interpreting the meaning and scope of the Bankruptcy Code's exemption for chapter 11 debtor estates from taxes imposed by States on sales of property of the estate made before the bankruptcy court has confirmed the debtor's plan of reorganization under § 1129 of the Bankruptcy Code.

The *Amici* file this brief in support of the decision of the Eleventh Circuit Court of Appeals

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[1] Pursuant to Rule 37 of the Rules of this Court, the *Amici* file this brief with the written consent of all parties, which has been filed with the Clerk of this Court. No counsel for a party has authored this brief in whole or in part. No person or entity including the *Amici* or their counsel made a monetary contribution for the preparation or submission of this brief; it has been prepared *pro bono*.

[2] The *Amici* are Richard Aaron, Professor of Law, S. J. Quinney College of Law, University of Utah; Jagdeep S. Bhandari, Professor of Law, Florida Coastal School of Law; Susan Block-Lieb, Professor of Law, Fordham Law School; Ingrid Hillinger, Professor of Law, Boston College School of Law; Lois R. Lupica, Professor of Law, University of Maine School of Law; C. Scott Pryor, Professor of Law, Regent University School of Law; and Keith Sharfman, Professor of Law, Marquette University Law School.

holding that such sales may be exempt from transfer taxes under some circumstances, but suggest a different basis for interpreting the exemption under § 1146(a) of the Bankruptcy Code than the one formulated by the Circuit Court.

SUMMARY OF ARGUMENT

The Court of Appeals for the Eleventh Circuit ruled that § 1146(a) of the Bankruptcy Code should be interpreted to exempt from State transfer taxes some pre-confirmation sales of property made by a chapter 11 debtor during the course of its reorganization under the Bankruptcy Code. Under the Eleventh Circuit's test, a pre-confirmation sale will be exempt if it is found that the transfer was "necessary for the consummation of a confirmed plan of reorganization." The Circuit Court declined to follow the interpretation of those courts which read § 1146(a) as granting exemption only if the sale was provided for by a provision of the plan of reorganization confirmed by the bankruptcy court under § 1129 of the Bankruptcy Code.

The *Amici* take a somewhat different approach to the interpretation of the phrase, "plan confirmed," in § 1146(a). They agree with the Eleventh Circuit's holding that § 1146(a) contains no temporal requirement that the plan of reorganization be confirmed before a sale may be made. However, the *Amici* believe that a pre-confirmation sale should be within the exemption if it is a material element of a business plan formulated by the chapter 11 debtor for its reorganization,

provided that the basis of the plan ultimately confirmed by the bankruptcy court under § 1129 is substantially the same as that of the earlier business plan. Because of the substantial identity between the pre-confirmation business plan and the plan confirmed, the two plans should be viewed as having been merged together upon confirmation under § 1129, making the sale under the business plan a sale under the "plan confirmed" within the meaning of § 1146(a). Such interpretation of § 1146(a) is consistent with Congress' purpose and the needs of a modern system for bankruptcy reorganization.

In formulating their suggested test, the *Amici* rely on several approaches to statutory interpretation that have been used by this Court to interpret provisions of the Bankruptcy Code. Among other interpretive factors, this brief examines the context in which the exemption from State transfer taxes was first enacted, and its place in the current context of bankruptcy reorganization. Pre-confirmation sales are commonplace in today's chapter 11 cases, but were permissible under early law only if there was an emergency or another compelling reason justifying such a sale. The *Amici* suggest that if the current practice of making pre-confirmation sales part of a debtor's program for reorganization had been the practice decades ago when Congress brought the exemption into bankruptcy reorganization law, it would have intended such sales to be exempt if the basis for the reorganization under the plan confirmed is substantially the same as provided by the debtor's program for reorganization under its earlier business plan.

The *Amici* urge that § 1146(a) be read as written, without adding a temporal requirement to its language. Under an important established interpretive principle, the Court should not write a temporal requirement into that provision because, unlike so many other Bankruptcy Code provisions, Congress did not itself do so in § 1146(a).

ARGUMENT

I.

A PRE-CONFIRMATION SALE IS EXEMPT FROM TRANSFER TAX UNDER BANKRUPTCY CODE § 1146(a) IF THE SALE IS A MATERIAL ELEMENT OF THE DEBTOR'S BUSINESS PLAN, AND THE BUSINESS PLAN CONSTITUTES THE BASIS OF THE DEBTOR'S PLAN OF REORGANIZATION LATER CONFIRMED BY THE BANKRUPTCY COURT UNDER § 1129

A. If the Debtor's Business Plan Has Substantially the Same Terms As Those Implemented By the Debtor's Confirmed Plan, they Merge, and the Pre-Confirmation Sale Is a Sale Under The "Plan Confirmed" Within the Meaning of § 1146 (a)

In many cases under chapter 11 of the Bankruptcy Code, the debtor's road to rehabilitation begins with a written business plan to chart the way in which the debtor will reorganize its business operations and finances. Indeed,

planning for a chapter 11 reorganization often occurs even before the chapter 11 case has been filed, through negotiation of a pre-packaged plan of reorganization which is confirmed under § 1129 in a subsequently filed chapter 11 case. See, e.g., *In re Trans World Airlines, Inc.*, 2001 WL 1820326, at *2 (Bankr. D. Del. 2001); *see also* Douglas G. Baird, *The New Face of Chapter 11*, 12 AM. BANKR. INST. L. REV. 69, 75-76 (2004). In restructuring their operations, most chapter 11 debtors plan pre-confirmation sales of at least some of their assets. Their business plans provide for the pre-confirmation sale of those assets which are not necessary to future operations, or where a sale is necessary to generate cash for operations or ultimate distribution to creditors. Pre-confirmation sales are often important steps in a debtor's program for reorganization.

Where a debtor's pre-confirmation sale of assets constitutes a material part of its business plan for its reorganization, and the plan of reorganization later confirmed carries out the terms of the business plan, the *Amici* suggest that such a sale be viewed as having occurred under the "plan confirmed" within the meaning of § 1146(a). Because the business plan merges with the "plan confirmed" in such circumstances, it follows that a sale under such a business plan constitutes a transfer under the "plan confirmed." As stated in *Western Auto Supply Co. v. Savage Arms, Inc.* (*In re Savage Industries, Inc.*), 43 F.3d 714, 720 n. 9 (1st Cir. 1994), ". . . the order approving the proposed sale . . . [was] for present purposes, the *functional equivalent* of an order confirming a conventional chapter 11 reorganization plan." (Italics added). The *Amici* thus urge that

§ 1146(a) be interpreted to exempt pre-confirmation sales that are a material element of the debtor's business plan, provided that the plan ultimately confirmed is structured on the basis of the debtor's business plan.

A meaningful reorganization requires the debtor to formulate a business plan that provides direction for the debtor's reorganization. Under § 1123(a)(5) of the Bankruptcy Code, a debtor's reorganization may be accomplished by an internal reorganization,[3] a transfer of property to other entities,[4] a merger or consolidation of the debtor with another entity,[5] or a sale of property.[6] Regardless of the form a debtor's business plan takes, a sale of property may be a material element of the business plan that provides the basis for the debtor's plan of reorganization, which is later confirmed by the bankruptcy court under § 1129. Where a pre-confirmation sale is such a material element, § 1146(a) should be interpreted to exempt it from a transfer tax.

A pre-confirmation sale of assets outside the ordinary course of business thus may be an important part of the program charted by the debtor for its reorganization in its chapter 11 case. Such a sale may be approved by a bankruptcy court only after notice to all creditors and an opportunity for a hearing has been given,[7] and

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[3] Bankruptcy Code § 1123(a)(5)(A).

[4] Bankruptcy Code § 1123(a)(5)(B).

[5] Bankruptcy Code § 1123(a)(5)(C).

[6] Bankruptcy Code § 1123(a)(5)(D).

[7] Bankruptcy Code § 363(b).

only if there is a good business reason for the sale. *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983). It has been held that a good business reason for a pre-confirmation sale exists if the transfer is necessary to the debtor's program for reorganization. In that connection, in *In re Chateaugay Corp.*, 973 F.2d 141, 143 and 144 (2d Cir. 1992), the court noted the finding below that the sale of a wholly owned subsidiary of the debtor was "a necessary step toward the confirmation of one [or] more Plans and [the debtors'] emergence from bankruptcy."

Another court likewise authorized the sale of a major asset because it would bring the debtor closer to reorganization. Thus, in *Matter of Baldwin United Corp.*, 43 B.R. 888, 906 (Bankr. S. D. Ohio 1984), the court observed that ". . . the removal of this asset and its attendant problems should have the effect of clearing away substantial obstacles to reorganization." Similarly, in *In re Trans World Airlines, Inc.*, 2001 WL 1820326, at *2-3 and *14 (Bankr. D. Del. Apr. 2, 2001), the court recognized that a sale of substantially all of an airline debtor's assets was an essential step in its business plan to merge with another airline, as the only means for its feasible reorganization, stating that the "Sale Order implements the public interest that favors an organized rehabilitation (albeit here as only a part of a larger viable enterprise) of a financially distressed corporation which lies at the core of chapter 11." A pre-confirmation sale of assets may thus be a material element of the debtor's business plan, which charts the way for its reorganization and ultimate confirmation by the bankruptcy court under

§ 1129 of the Bankruptcy Code. Section 1146(a) should be interpreted to exempt a sale that is a material element of the debtor's business plan that merges with the confirmed plan.

B. Historical Overview Of § 363(b)'s Authorization of Pre-Confirmation Sales

The standard for allowing pre-confirmation sales other than in the ordinary course of business has evolved over time. Initially, courts limited pre-confirmation sales to emergencies and other compelling circumstances. *In re Lionel Corp.*, 722 F.2d at 1070-1071. After the Bankruptcy Code was enacted in 1978, that restrictive standard for sales was replaced by the "business purpose" test, which became the test for authorizing non-ordinary course sales under § 363(b) of the Bankruptcy Code. *Id.*

In administering the Bankruptcy Code, courts recognize the need for some flexibility in the interpretation of its provisions in order to accomplish its objectives. "[I]f a bankruptcy judge is to supervise a business reorganization case successfully under the Code, then . . . some play for the operation of both § 363(b) and Chapter 11 must be allowed for." *Id.* at 1071, paraphrasing Justice Holmes' statement in *Missouri, Kansas, and Texas Ry. Co. v. May*, 194 U.S. 267, 270 (1904) ("some play must be allowed for the joints of the machine. . . ."). This does not mean that a bankruptcy court has *carte blanche* to order § 363(b) sales. Under § 363(b), such a proposed sale must be to accomplish a good business rea-

son if it is to be authorized by the bankruptcy court. As the *Lionel* court stated,

> Resolving the apparent conflict between Chapter 11 and § 363(b) does not require an all or nothing approach. Every sale under § 363(b) does not automatically short-circuit or side-step Chapter 11; nor are these statutory provisions to be read as mutually exclusive.

722 F.2d at 1071. When the Bankruptcy Code's sale and reorganization provisions are read together, a sale that is an integral part of a chapter 11 debtor's program for reorganization is within §1146(a)'s exemption.

A debtor should not have to wait until the plan confirmation process has commenced for its reorganization to progress. Indeed, the terms for a debtor's reorganization should be formulated long before confirmation of its plan, and are generally structured in its business plan written much earlier in its chapter 11 case, if not before it has been filed. Nothing in the text of § 1146(a) or its legislative history indicates that Congress intended that debtors were to be required to wait until confirmation of a plan of reorganization to sell assets in order for a sale to be exempt from transfer tax.

C. Section 1146(a)'s Text Does Not Contain a Temporal Requirement, and Congress Did Not Intend One

The legislative history of § 1146(a) indicates that it was modeled upon § 267 of the 1938 Bankruptcy Act. *See* H.R. Rep. No. 595, 95th

Cong., 1st Sess. 421 (1977). Former § 267 exempted from stamp taxes "the making or delivery of instruments of transfer under any plan confirmed." In turn, § 267 was derived from its direct predecessor, the Bankruptcy Act of 1934, which, in § 77(B)(f), used the language,"to make effective any plan," as the basis for such exemption. Where the basis for the debtor's reorganization is substantially the same under its business plan and confirmed plan, a sale under the business plan is one of the elements that makes the confirmed plan effective. Section 1146(a) should thus be interpreted to exempt such a sale.

Analogous case law supports interpreting § 1146(a) to exempt pre-confirmation sales that satisfy the test suggested by the *Amici*. This Court, in *Martin v. Hadix*, 527 U.S. 343 (1999), declined to infer a temporal provision where Congress had not expressly mandated one. *Id.* at 354. There, this Court did not allow fee awards to be capped retroactively on claims pending at the time of the enactment of the statute at issue. It explained that if Congress had desired such a result, "it could have used language more obviously targeted to addressing the temporal reach of that section." *Id. United States v. Wright*, 48 F.3d 254 (7th Cir. 1995), likewise held that a temporal element should not be injected into a statute if Congress has not written one into the provision. In that case, the Seventh Circuit explicitly stated that if Congress wanted to create a temporal restriction in the law, it would have done so in express terms. *Id.* at 255 and 256. Other Circuit Courts have similarly ruled that a temporal element should not be read into

a statute. *United States v. Sullivan*, 219 Fed. Appx. 414, 417 (6th Cir. 2007); *United States v. Presley*, 52 F.3d 64, 69-70 (4th Cir.), *cert denied*, 516 U.S. 891 (1995).

Had Congress intended there to be a temporal requirement in § 1146(a), it could have added one to § 1146(a) in the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act, when it revisited many of the business-related provisions of the Bankruptcy Code enacted in 1978. Pub. L. No. 109-8, 119 Stat. 23 (2005). Indeed, Congress did focus on the previously enacted provisions of § 1146 when writing those 2005 amendments, and in fact amended the provisions of § 1146 then in force, but without injecting a temporal requirement into the exemption.

Unlike several other provisions of the Bankruptcy Code that expressly contain a temporal requirement, § 1146(a) does not so provide. As stated by this Court in *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, reh'g denied, 512 U.S. 1247 (1994), in regard to another provision of the Bankruptcy Code: "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." At the same Term, this Court likewise used that basis for statutory construction in *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (*quoting Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). *See also, Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("Congress 'says in a statute what it means and means in a statute what it says there.' ") (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)); *Nat'l Fed'n of*

Fed. Employees, Local 1309 v. Department of Interior, 526 U.S. 86, 104 (1999).

Unlike many other provisions of the Bankruptcy Code that turn on a temporal requirement, none was written into § 1146(a). Moreover, if Congress had intended a temporal requirement it could be expected that it would have at least been mentioned in the legislative history. *Dewsnup v. Timm*, 502 U.S. 410, 419-420 (1992).

As noted above, other sections of the Bankruptcy Code do contain temporal provisions, such as the 120 day plan-filing exclusivity period in § 1121(d) and the lease rejection provisions in § 365(d)(4). When Congress intends that a statute have a temporal requirement, it makes its intention clear by including explicit language in the provision. For example, it did so in § 502's provision for determining claims in bankruptcy, which states that the amount of every claim must be determined "as of the date of the filing of the petition." The connection between time and claims does not end there. Claims are divided by the Bankruptcy Code into two categories, depending on whether they arise before or after the commencement of the bankruptcy case. If a claim arises after commencement of a case, then it will be afforded administrative priority of distribution if it benefited the estate, whereas it will not have priority if it arose pre-petition. Bankruptcy Code §§ 503(b) and 507. Likewise, a temporal requirement is explicitly set forth in the automatic stay provisions of § 362(a)'s clauses (1), (2), (5), (6), and (8).

If Congress intended to include a temporal requirement in § 1146(a), "it clearly knew how to

draft language to that effect." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 302 (2002). Absent such language, § 1146(a) should not be interpreted as having a temporal requirement.

D. Analogous Contract and Tax Law Support the *Amici's* Proposed Test

Generally, under state contract law, multiple agreements may be read as one if the parties so intended. *Arciniaga v. General Motors Corp.*, 460 F.3d 231, 237 (2d Cir.), *cert. denied 127 S. Ct. 838 (2006)*; *Jackson v. Cintas Corp.*, 425 F.3d 1313, 1317 (11th Cir. 2005) (whether contract is entire or severable is determined by parties' intent, which may be expressed directly, through severability clause, or indirectly). The issue typically is whether agreements belong to one contract or two different contracts.[8] Two contracts are treated as one when the terms, nature, and purpose are common to each other or they are otherwise interdependent.[9] By analogy, in the context of a chapter 11 reorganization, pre-confirmation sales may be a material element of the debtor's plan for reorganization, and such plan may be the basis of the formal plan of reorgani-

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[8] "A divisible contract is one where the performance by each party is divided into two or more parts, and the performance of each part by one party is the agreed exchange for a corresponding part by the other party." RESTATEMENT (SECOND) OF CONTRACTS § 240 (1981). An indivisible or entire contract is one contract when the parties intend that the terms, nature, purpose, and consideration are common to each other and interdependent. Joseph D. Calamari & Joseph M. Perillo, THE LAW OF CONTRACTS § 478, n. 76 (3d ed. 1987).

[9] *Id.*

zation that is later confirmed. Section 1146(a) should be interpreted to exempt a pre-confirmation sale that is a material element of the debtor's reorganization program set forth in its business plan that is effectuated by its confirmed plan, because both plans merge, in the same way that two agreements merge into one contract.

Moreover, where the debtor's business plan under which it makes a sale is part of the basis of its confirmed plan, both plans should be viewed as parts of one unit, just as the tax law treats separate steps taken toward a single goal as part of a single overall transaction. In tax law, this "step transaction" doctrine treats a series of interrelated transactions as one single transaction, instead of separate steps, regardless of the resulting tax consequences. *Comm'r v. Clark*, 489 U.S. 726, 738 (1989). The purpose of the "step transaction" doctrine is to assure that the tax consequences of a transaction turn on the substance of that transaction and not its form. *Greene v. U.S.*, 13 F.3d 577, 581 (2d Cir. 1994), citing *Comm'r v. Court Holding Co.*, 324 US 331 (1945); see also, *King Enterprises, Inc. v. U.S.*, 418 F.2d 511, 517 (Ct. Cl. 1969) (The "central purpose of the step transaction doctrine [is] to assure that tax consequences turn on the substance of a transaction rather than on its form.").

Under this doctrine, supposed separate transactions will be treated as merged into a single transaction when it is apparent that the separate transactions were entered into in order to accomplish the result of a single plan. *Associated Wholesale Grocers, Inc. v. U.S.*, 927 F.2d 1517, 1523 (10th Cir. 1991); *Security Indus. Ins. Co. v.*

U.S., 702 F.2d 1234, 1246 (5th Cir. 1983); *King Enterprises, Inc. v. U.S.*, 418 F.2d 511, 517 (1969). Further, courts commonly apply the "end results" test to determine whether the "step transaction" doctrine applies in a given case. *Associated Wholesale Grocers*, 927 F.2d at 1522-23. Under this test, seemingly separate transactions will be viewed as a single transaction when it appears that they were steps of a single transaction designed to achieve a particular ultimate result. *Id.*

In the chapter 11 context, the "business plan" and the "plan confirmed" may be inextricably inter-related pieces of a single plan for achieving the debtor's reorganization. Where that is so, a pre-confirmation sale that is material under the business plan should be exempt from transfer tax imposed by § 1146(a) because it is essentially an integral step in the program designed to achieve the debtor's reorganization under the "plan confirmed." The substance of the transaction should not be ignored in the absence of clear language in § 1146(a) requiring such a result.

II.

ESTABLISHED MEANS FOR STATUTORY INTERPRETATION CALL FOR INTERPRETING § 1146(a) AS EXEMPTING TRANSFERS UNDER THE AMICI'S PROPOSED TEST

A. Section 1146(a) Should Be Construed In the Context of Present Chapter 11 Practice

In recent years, pre-confirmation sales have become increasingly more prevalent in chapter 11 cases. See Harvey R. Miller and Shai Y. Waisman, *Is Chapter 11 Bankrupt?*, 47 Boston College L. Rev. 129, 156 (2005) (citing several cases which involved asset sales). Today, courts routinely allow § 363(b) to be used to effect pre-confirmation sales of many, if not substantially all, of the debtor's assets in chapter 11 cases. *Id.* A pre-confirmation sale may have a significant role in accomplishing the debtor's reorganization under chapter 11. Where that is so, § 1146(a) should be interpreted to exempt it from transfer tax.

The ubiquity of § 363(b) sales is an immense change in circumstances that was not anticipated by Congress at the time it brought a transfer tax exemption provision into bankruptcy reorganization law 74 years ago when it enacted the Bankruptcy Act of 1934. In those earlier times, pre-confirmation sales were limited to circumstances involving a compelling need for a debtor to make a sale before confirmation, such as the

wasting nature of an asset.[10] In the very recent context of chapter 11 cases, however, pre-confirmation sales under § 363(b) are no longer restricted to such limited circumstances and are made in many chapter 11 cases as a matter of good business judgment.

If pre-confirmation sales had been commonly made when Congress brought such exemption into the bankruptcy reorganization law, it would have intended, by the provision it enacted, to exempt such sales because they were in furtherance of its original theory to exempt those sales that "make effective any plan." Bankruptcy Act of 1934. See discussion in Section I.C *supra*.

The current prevalent use of pre-confirmation sales of assets as an important reorganizational tool is the context in which § 1146(a) should be interpreted. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991); *United States v. Sanchez*, 511 U.S. 350, 357 (1994); *Ali v. Federal Bureau of Prisons*, __ U.S. __ 2008 WL 169359 at *11 (2008) (dissenting opinion, per Kennedy, J.). Section 1146(a) should be interpreted in this current context, especially in light of chapter 11's flexibility.[11] When there have been dramatic changes

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[10] See generally *In re Lionel Corp.*, 722 F.2d at 1066-1069; *In re V. Loewer's Gambrinus Brewery Co.*, 141 F.2d 747, 748-749 (2d Cir. 1944) (Court approved sale of debtor's brewery as it was a rapidly wasting asset and perishable, stating: "[T]he disposition of the property could not be longer delayed without peril to all interests.").

[11] James H.M. Sprayregen, P.C., Jonathan Friedland and Roger J. Higgins, *Chapter 11: Not Perfect, But Better Than the Alternatives*, 14 J. BANKR. L. & PRAC. 6 ART. 1, 11 (2005) ("Chapter 11's inherent flexibility has fostered new means of

and a statute is ambiguous, courts should look beyond the statute's original context and view it in its current circumstances. "In cases of changed circumstances, statutory construction appears informed by an effort to ensure integrity and coherence in the law by 'updating' obsolete statutes—or, to put it less contentiously and probably more accurately, by interpreting them in a way that takes account of changing conditions." Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 493 (1989).

Moreover, this Court has observed that construction of Bankruptcy Code provisions is a holistic endeavor. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme. . . ."). Accord: *Dodd v. United States*, 545 U.S. 353, 370 n.10 (2005) ("Our cases make clear that when interpreting a particular section of a statute, we look to the entire statutory scheme rather than simply examining the text at issue."); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. at 371.

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preserving going-concern value in complex corporate transactions."); Harvey R. Miller and Shai Y. Waisman, *Is Chapter 11 Bankrupt?*, 47 Boston College L. Rev. 129, 146 (2005) ("From the outset, the Bankruptcy Code was understood to be a flexible document, with its provisions to be shaped and interpreted to meet the needs of the Congressional policy of furthering rehabilitation. Early case law illustrates the manner in which policy considerations behind the 1978 Act encouraged a pragmatic view and application of the Bankruptcy Code.").

Section 1146(a)'s context is important because it illuminates its meaning. Section 1146(a) contains a phrase, "plan confirmed," which is rendered ambiguous because current chapter 11 cases regularly involve pre-confirmation sales, many of which are integral to the debtor's ultimate reorganization. In the interpretation of a statute, when circumstances have significantly changed, its meaning should not be confined to a literal reading that Congress would not have wanted had the new circumstances existed when the provision was written. *Perry v. Commerce Loan Co.*, 383 U.S. 392, 397-400, reh'g denied, 384 U.S. 934 (1966) (reviewing Chapter XIII of the Bankruptcy Act of 1938).

The increase in the usage of pre-confirmation sales in chapter 11 cases, along with the transformation in the bankruptcy process as a whole, is a change in circumstances upon which Congress could not have focused when originally drafting the transfer tax exemption decades ago. Had such circumstances existed when Congress was considering whether to bring the exemption from transfer taxes into the law, it surely would have intended such pre-confirmation sales to be exempt.

B. Interpreting § 1146(a) In Light Of The Pre-Confirmation Sale Process

Debtors favor pre-confirmation sales rather than waiting for confirmation, because early sales are often an important means to advance its business plan for reorganization, whereas its reorganization efforts could be beset by uncertainty and greater costs if it were to await the plan confirmation process before selling assets. Such delay would create uncertainty as to the

ultimate selling price of assets to be sold, and also risk the loss of potential purchasers and the best price.

Section 1146(a) should thus be interpreted broadly to exempt pre-confirmation sales that are part of a debtor's business plan, as a means of maximizing the value of the estate for its creditors as part of a modern, efficient and effective system for bankruptcy reorganization.

CONCLUSION

For the foregoing reasons, the order appealed from should be affirmed.

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Petitioner,

v.

PICCADILLY CAFETERIAS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether 11 U.S.C. § 1146(c) of the Bankruptcy Code, which exempts from stamp or similar taxes any asset transfer "under a plan confirmed under section 1129 of the Code," applies to transfers of assets occurring prior to the actual confirmation of such a plan.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in all legal issues affecting the balance between federal and state power, and in the proper construction of federal statutes that exempt taxpayers from garden-variety state taxes. Because the Court's interpretation of §1146(c) will have an impact on the federal-state balance and the States' sovereign authority to tax, *amici* submit this brief to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

A. *Amici* agree with Florida that the plain language of §1146(c) exempts only post-confirmation transfers from state stamp taxes. Yet even if the statute could be plausibly read otherwise, fundamental precepts of federalism counsel a narrow construction.

Any federal law that interferes with state tax law and policy is an intrusion upon state sovereignty that disrupts the federal-state balance. Consequently, this Court has long followed rules of construction that ensure that federal statutes interfere with state taxation "as little as possible." *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995) (citation omitted). If Congress intends to alter the federal-state balance, "it

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[1] The parties have consented to the filing of this *amicus* brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

While Congress clearly intended to exempt post-confirmation transfers from stamp taxes, it is by no means clear that it intended the exemption to encompass pre-confirmation transfers, or even to apply *only* to state and local government taxation. At the time of its enactment in 1934, the predecessor provision of §1146(c) applied only to federal stamp taxes. Four years later, it was expanded to include state stamp taxes. The federal stamp tax was repealed in 1965. What remains is a federally-created exemption from a state and local excise tax on the privilege of using the recording offices of court clerks. These taxes are relatively small in each instance but large in the aggregate, and are used to fund essential government services. Because there is no evidence that Congress considered, much less squarely confronted, the federalism implications of creating an exemption solely from such state taxation, federal courts must read the exemption no more broadly than is absolutely necessary.

This Court has specifically instructed that federal courts must be particularly sensitive to federalism concerns "when asked to recognize an exemption from state taxation that Congress has not clearly expressed." *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 851–52 (1989). Because the court of appeals gave no weight to the federalism implications of its broad construction of §1146(c), its judgment should be reversed.

B. Taken to its logical conclusion, the court of appeals' construction of §1146(c) broadens the scope of the exemption beyond any reasonable limit. Even if, as that court apparently would require, there be a

"nexus" to some future confirmed plan, the standard is illusory since the vast majority of bankruptcy cases do not result in a plan confirmed under §1129. Thus, in most cases debtors will argue that an asset sale is essential for the consummation of some future plan and thus exempt from tax under §1146(c). Whether the plan is ever confirmed or even filed will not affect the asserted need for the transfer.

The fact that respondent simultaneously filed its bankruptcy petition, motion for sale of substantially all its assets, and request for a tax exemption, *see* Pet. App. 12a, is noteworthy. It may well be a worrisome harbinger of tax-avoidance strategies that would be facilitated by a broad construction of §1146(c), especially on the part of debtors with substantial assets to sell and nothing to lose by claiming an exemption.

Moreover, stamp tax is modest in comparison to an asset's value but substantial in the aggregate for the taxing entity. Such an adverse fiscal consequence for States and their political subdivisions reinforces the conclusion that federal courts construing §1146(c) must respect state tax law and policy given the absence of a clear Congressional command to do otherwise.

ARGUMENT

ASSET TRANSFERS PRIOR TO PLAN CONFIRMATION ARE NOT EXEMPT FROM STAMP AND SIMILAR TAXES

The court of appeals gave an untenably broad reading to the exemption from state taxation set forth in §1146(c). Its interpretation is plainly wrong as a matter of statutory construction, as petitioner Florida Department of Revenue ("Florida") argues.

Pet. Br. 12–25. This broad reading also raises troubling federalism questions that strongly counsel giving the statute its narrowest possible construction. *See Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995); *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 851–52 (1989). The court of appeals' holding that pre-confirmation asset sales are exempt from state transfer taxes should accordingly be reversed.

A. Federalism Principles Counsel that §1146(c) Should Not Be Read To Interfere with State Taxation More Than Is Absolutely Necessary.

Amici agree with Florida that the plain language of §1146(c) exempts only post-confirmation transfers from state stamp taxes. Yet even if the statute could be plausibly read otherwise, fundamental precepts of federalism strongly counsel that it be given the narrowest possible construction.

"It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Nat'l Private Truck Council*, 515 U.S. at 586 (quoting *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871)); *see also Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 561 (1830). Any federal law that interferes with a mundane state tax, such as stamp taxes on sales of real estate, is an intrusion upon state sovereignty that disrupts the federal-state balance.

"[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal

law overrides this balance." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citation and internal quotation marks omitted). And "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Id.* (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (internal citation omitted).

Congress clearly intended §1146(c) to create an exemption from state stamp taxes. However, it is by no means clear that Congress intended it to encompass pre-confirmation transfers, or even to apply *only* to state and local government taxation.

When Congress first enacted the exemption in 1934, it applied only to federal stamp taxes. *See* Pet. Br. 4 (citing 11 U.S.C. § 267(f) (repealed 1938)). In 1938, Congress expanded the exemption to include state as well as federal taxes. *See id.* But when the federal documentary stamp tax was repealed, *see* Excise Tax Reduction Act of 1965, Pub. L. 89-44, § 401(b), 79 Stat. 148 (1965) (effective January 1, 1968), §1146(c) only applied to state and local government taxes. Because there is no evidence that Congress ever considered—much less squarely confronted—the question whether it ought to create an exemption solely from state taxation when it enacted §1146(c), principles of federalism strongly counsel against reading the exemption more broadly than is absolutely necessary.

This is an ineluctable consequence of the "wise principle[ ] this Court has long followed. . . . . [U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 347–49 & n.16 (1971) (collecting cases). In

Bass, the Court declined "to assume that Congress . . . meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Id.* at 349.

State tax law and policy are surely no less sensitive an area than state criminal jurisdiction. In such "traditionally sensitive areas . . . the requirement of clear statement assures that [Congress] has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* Here, given the statutory history of the tax exemption, there is no evidence, and no reason to infer, that Congress faced the fundamental federalism problems resulting from its creation of a bankruptcy exemption from garden-variety state tax that is paid by all other taxpayers who sell assets.

The court of appeals ignored this axiom of constitutional federalism, even though it has been directly applied by this Court to a state tax on property in the hands of a bankruptcy trustee. *See Swarts v. Hammer*, 194 U.S. 441, 444 (1904). In *Swarts*, the Court declined to infer Congress's intent to exempt from state and local taxation "property in the hands of a trustee in bankruptcy." *Id.* at 443. As the Court explained,

> By the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property. It is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing in that to withdraw it from the necessity of protection by the State and municipality, or which should exempt it from its obligation to either.

Id. at 444. In language directly applicable here, the Court further reasoned: "*If Congress has the power*

to declare otherwise and wished to do so the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." *Id.* (emphasis added).[2]

This Court has long recognized that the structure and administration of taxation is "a decision of the most fundamental sort for a sovereign entity." *Gregory*, 501 U.S. at 460; *see Tucker v. Ferguson*, 89 U.S. (22 Wall.) 527, 575 (1875); *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 561 (1830); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425 (1819). Not only is the States' taxing power an original power, "not abridged by the grant of a similar power to the government of the Union," *McCulloch*, 17 U.S. (4 Wheat.) at 425, it is obviously central to the very functioning of government. *See Nat'l Private Truck Council*, 515 U.S. at 586 (quoting *Dows*, 78 U.S. (11 Wall.) at 110).

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[2] *Amici* recognize that this case calls only for statutory construction, not for constitutional adjudication. *See* Pet. i (question presented). They also recognize that this Court has said that, at least in the context of intergovernmental tax immunity, "Congress can confer an immunity from state taxation." *Sierra Summit*, 490 U.S. at 851–52 (citing intergovernmental tax immunity cases).

Amici nonetheless respectfully suggest that serious constitutional questions would be raised by the specter of unlimited Congressional authority to exempt taxpayers from state taxes used to fund essential government services. *See* 84 C.J.S. *Taxation* § 167 (2001) (stamp taxes are "an excise on the privilege of using the recording offices of the clerks of the court for the purpose of perfecting security interests"). *Cf. New York v. United States*, 505 U.S. 144 (1992).

The fact that the power to tax is a core attribute of state sovereignty leads to two fundamental corollaries. First, as noted above, a federal court "must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed." *California Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 851–52 (1989) (citation omitted). Second, exemptions from taxation are strictly construed and "not to be enlarged by implication." *United States v. Stewart*, 311 U.S. 60, 71 (1940) (citation omitted); *see also Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 102 (1981) (recognizing "the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems").

Thus, for Congress to create an exemption from state taxation, it must clearly delineate that exemption. Yet here, while Congress clearly exempted post-confirmation transfers, it is anything but clear that §1146(c) exempts transfers that occur prior to the confirmation of a plan. Indeed, the arguments supporting such an argument rest almost exclusively on bankruptcy policy—a patently insufficient basis for invading state sovereignty.[3] Even if such policy

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[3] There is no evidence in the legislative history concerning whether the goals of Chapter 11 would be better served by exempting pre-confirmation transfers or only those post-confirmation. Thus, the bankruptcy policy assumed by the court of appeals, *see* Pet. App. 8a, are of no import. Where interpretation of a statute turns on a question reserved "exclusively to the political branches of our Government," the Court has no authority "to substitute [its] judgment for that of the Congress." *Fiallo v. Bell*, 430 U.S. 787, 798 (1977); *see In re Hechinger Inv. Co. of Delaware, Inc.*, 335 F.3d 243, 256 (3d Cir. 2003) (noting that "opposing sides both cite policies that Con-

considerations sufficed to create ambiguity—a view that *amici*, like Florida, flatly reject—that would strongly counsel judicial restraint given the federalism concerns at stake.

To be sure, the apparent purpose of §1146(c) is to promote reorganizations under Chapter 11. *See In re Jacoby-Bender, Inc.*, 758 F.2d 840, 841 (2d Cir. 1985).[4] But it does not follow from this general aim that Congress intended the exemption to encompass asset sales that occur before the confirmation of a §1129 plan.[5] Neither the text of the statute nor its legislative history support this interpretation. *See In re Hechinger Inv. Co. of Delaware, Inc.*, 335 F.3d 243, 254 (3d Cir. 2003) (finding not "a scintilla of evidence from the legislative history" to support broad interpretation of §1146(c)).

Indeed, construing §1146(c) to exempt only post-confirmation transfers furthers the purpose of promoting reorganizations. By providing a benefit to debtors who make a good-faith effort to reorganize,

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gress might have wished to further when it enacted the law at issue" and declining to interpret §1146(c) on the basis of policy).

[4] As Florida explains, respondent apparently was not engaged in reorganization. *See* Pet. Br. 7 (neither of the plans filed by respondent "provide[d] for any form of reorganization"); *see generally* Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 Stan. L. Rev. 673, 674 (2003) (discussing the growing trend of businesses "us[ing] Chapter 11 merely to sell their assets and divide up the proceeds"). This practice is contrary to the presumed purpose of §1146(c) to facilitate reorganizations. *See Jacoby-Bender*, 758 F.2d at 841.

[5] Since few plans of reorganization are confirmed, *see* Karen Cordry, *The Incredible Expanding Section 1146(c)*, 21 Am. Bank. Inst. J. 10, 10 (Dec. 2002–Jan. 2003), limiting relief to confirmed plans will be least disruptive of the States' taxing authority.

§1146(c) acts as an incentive to confirmation. Likewise, denying pre-confirmation tax relief ensures that debtors have no incentive to circumvent the detailed statutory scheme that Congress enacted to safeguard the rights of plan stakeholders. *See* 11 U.S.C. §§ 1125-29, 1141. Thus, contrary to the view of the court below, limiting tax relief to post-confirmation transfers does not "abrogate the purpose of the exemption." Pet. App. 8a (quoting *Hechinger*, 335 F.3d at 259) (Nygaard, J., dissenting).[6]

It may be, as respondent contends, that under certain circumstances a pre-confirmation transfer is necessary to capture the maximum value of a debtor's asset or raise funds in pursuit of a plan. *See* Br. Opp. 27 (quoting Pet. App. 8a). But this is beside the point. The imposition of a stamp tax of less than 1% of the value of the asset, Fla. Stat. § 201.02(1), is highly unlikely to thwart these deals. Therefore, while a debtor may well regard a tax exemption as an attractive windfall, an exemption is not necessary for a debtor to transfer its assets. *Accord Palmer v. Webster & Atlas Nat'l Bank of Boston*, 312 U.S. 156, 163 (1941) ("No good reason is perceived why a receiver should be permitted to operate under such an advantage as against his competitors not in receivership, and the States and local governments be deprived of this revenue."); *In re Leavy*, 85 F.2d 25, 27

[6] As such, liberal construction is unnecessary to give effect to §1146(c)'s apparent purpose to facilitate reorganization. However, even if §1146(c) is "a remedial statute [which] should be liberally construed," Pet. App. 8a, this Court has made clear that even that most remedial of federal statutes, 42 U.S.C. § 1983, cannot be read to infringe upon state taxation beyond Congress's unequivocal command. *See Nat'l Private Truck Council*, 515 U.S. at 582; *see also Gregory*, 501 U.S. at 467 (declining to interpret the scope of the ADEA to cover state judges).

(2d Cir. 1936) (Augustus Hand, J.) (where a tax of 2% was imposed on property sold by a bankruptcy trustee, "[i]t seems unreasonable to treat the absence of an exemption from taxes as a burden").

As this Court has repeatedly instructed, federal courts must be particularly sensitive to federalism concerns "when asked to recognize an exemption from state taxation that Congress has not clearly expressed." *Sierra Summit*, 490 U.S. at 851–52. Because the court of appeals gave no weight either to this Court's teachings or to the core federalism principles at stake in this case, its judgment should be reversed.

B. There is No Statutory Basis for Affirming the Court of Appeals' Judgment, and Its Broad Construction of §1146(c) Could Have Numerous Adverse Consequences.

While Florida does not dispute that §1146(c) provides a state tax exemption for post-confirmation asset transfers, the court of appeals' reading of the statute broadens its scope beyond any reasonable limit. Taken to its logical conclusion, this reading could exempt from state and local stamp tax every asset transfer made at any time after a bankruptcy petition has been filed, without regard to when a plan is confirmed.[7] Because there is no textual or other basis for such a broad reading, the judgment of the court of appeals should be reversed.

For the judgment below to be reconciled with the text of the statute, "under a plan confirmed" must

[7] Though the court of appeals acknowledged "some nexus between the pre-confirmation sale and the confirmed plan," Pet. App. 9a, this requirement is a judicially-drawn line that is not grounded in the text of §1146(c).

mean "necessary for the confirmation of a plan." *See* Pet. App. 13a ("Consummation of the Sale to Purchaser is necessary to the consummation of any plan.").[8] There is, however, no dictionary definition of "under" that means "necessary for." *See Webster's Third New International Dictionary* 2487 (1976); *Hechinger*, 335 F.3d at 255 (noting that no definition of "under" corresponds to "necessary for" (citing *Random House Unabridged Dictionary* 2059 (2d ed. 1993))).

Without a textual basis for its reading of §1146(c), the court of appeals' interpretation is unbounded. Even if, as the court would require, there

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[8] In *Jacoby-Bender*, the Second Circuit held that a transfer of assets that occurred *after* a plan was confirmed was exempt from taxes under §1146(c) because it was "necessary to the consummation of a plan." 758 F.2d at 841. As Florida argues, "consummation" of a plan is not the same as "confirmation" of a plan. Pet. Br. 23–24; *see also In re NVR, LP*, 189 F.3d 442, 455–456 (4th Cir. 1999) (noting that lower courts have confused "consummation" with "confirmation" and thus "twist[ed] the Second Circuit's language to the defeasance of § 1146(c)'s own terms").

"Consummation," defined as "the act of completing" or "bringing to perfection," requires an existing plan. *Webster's Third New International Dictionary* 490 (1976); *NVR*, 189 F.3d at 456 ("Consummation or execution of a reorganization plan cannot take place until the bankruptcy court first confirms a plan."). Therefore, a transfer that is necessary to the consummation of a plan, as in *Jacoby-Bender*, is a transfer that takes place after a plan has been confirmed in order to perfect it. On the other hand, "confirmation" is a technical term of bankruptcy which refers to the initial approval of the bankruptcy court, following its consideration of thirteen statutory requirements. *See* 11 U.S.C. § 1129. It is altogether unclear what transfers are "necessary to the confirmation of a plan," but in the absence of judicially-created limits, any transfer of assets could arguably qualify.

be a "nexus" to some indeterminate future plan, the requirement of confirmation is, as a practical matter, illusory, since "the vast majority of cases do *not* confirm a plan." Karen Cordry, *The Incredible Expanding Section 1146(c)*, 21 Am. Bank. Inst. J. 10, 10 (Dec. 2002–Jan. 2003). Consequently, taxpayers and bankruptcy trustees will argue that any transfer undertaken to fund later reorganization proceedings is necessary to the confirmation of a hypothetical plan; whether a plan is ever confirmed—or even filed—does not affect the status of the transfer as necessary to confirmation. *See* Br. Opp. 22 (emphasizing that "the *necessity* of the transfers to the confirmation of a plan, rather than the *timing* of the transfers, determines whether the State was entitled to tax the transfers").

For example, a business may need to engage in a sale of its assets before a plan is confirmed or proposed in order to stay in business, *see NVR*, 189 F.3d at 448, or to avoid a motion to convert its Chapter 11 case to Chapter 7. *See In re Permar Provisions, Inc.*, 79 B.R. 530, 531–33 (Bankr. E.D.N.Y. 1987). Such a sale would be necessary to any subsequent plan of reorganization, because no plan, confirmed or otherwise, would be possible "but for" the sale. If a proposed plan fails to be confirmed later, this does not alter the fact that, *ex ante*, the transfer was necessary to any plan that could have arisen.

No lower court, including the court below, has yet held that a transfer is exempt from taxes even if a plan is never confirmed. Once the operative language is effectively transformed from "under a plan confirmed" to "necessary to the confirmation of a plan," however, there is there is nothing in the text of the statute to prevent this conclusion.

The fact that respondent simultaneously filed: (1) its bankruptcy petition, (2) a motion under 11 U.S.C. § 363(b)(1) for sale of substantially all of its assets, and (3) a request for a stamp tax exemption, *see* Pet. App. 12a, is a worrisome harbinger of clever tax-avoidance strategies that would be facilitated by a broad construction of §1146(c).[9] *See also In re Hechinger Inv. Co. of Delaware Inc.*, 276 B.R. 43, 47 (D. Del. 2002) (concluding that all transfers are exempt so long as a plan is eventually confirmed); *Clerk of the Circuit Court for Anne Arundel County v. NVR Homes, Inc.*, 222 B.R. 514 (E.D. Va. 1998), *rev'd*, 189 F.3d at 442 (same).

Other lower courts that have expanded §1146(c) have at least required a pending plan to exist at the time of transfer. *See, e.g., In re Webster Classic Auctions, Inc.*, 318 B.R. 216, 219 (Bankr. M.D. Fla. 2004) (holding that "there can be no sale 'under a plan confirmed' in this case because the Debtor had no plan of reorganization on the date of the transfer"); *In re Beulah Church of God in Christ Jesus, Inc.*, 316 B.R. 41, 47 (Bankr. S.D.N.Y. 2004) (distinguishing *NVR Homes* and *Hechinger* on the ground

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[9] As one commentator has recently noted,

> [A] number of recent cases . . . seek to take a far greater bite from state taxpayers by expanding the exception, both as to the character of the taxes and the number of transactions covered. This would be objectionable enough if the issues were clearly presented, but that doesn't always happen. Such motions are often made without a listing of the property being transferred, so tax authorities do not know if they are affected. Even more problematic is a growing practice by which the motion refers to §1146, but the debtor's proposed order includes a broader exemption.

Cordry, *Expanding Section 1146(c)*, *supra*, at 10.

that those courts "did not have occasion to consider a situation . . . where the sales at issue were specifically pursued in view of a filed plan"); *see also In re 310 Associates, L.P.*, 282 B.R. 295, 298–99 (S.D.N.Y. 2002) (finding no need to choose between competing interpretations of §1146(c) because no plan of reorganization was drafted at the time of transfer).

The disagreement regarding the exemption's scope is itself evidence that Congress's intent to exempt pre-confirmation transfers from tax is far from clear. But even if the lower courts could agree in their interpolation of "under" and the substantive content of "necessary for," a host of other questions would require judicial resolution. *See* Cordry, *Expanding Section 1146(c), supra*, at 10; Walter C. Little, *Bankruptcy: In Re Webster Classic Auctions: Is the Door Finally Open for a Practical Application of § 1146(c)?*, Fla. Bar J. 28 (December 2005).

Finally, the consequence of a ruling that expands §1146(c) to encompass pre-confirmation transfers is that direct and indirect costs borne by the States and the courts will be grossly disproportionate to the benefits reaped by any individual debtor. Because the value of a stamp or similar tax is less than 1% of the consideration paid, a debtor's "burden" will always be light. By contrast, the States derive substantial revenue through the aggregation of these taxes.[10] Without an unmistakably clear statement

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[10] To give just one recent example, on January 17, 2008, the Illinois legislature enacted an emergency mass-transit funding act for the Chicago region, sponsored by Rep. Julie Hamos, which relies heavily on a "$100 million Real Estate Transfer Tax imposed in Chicago by [the] Chicago City Council." Mass Transit Funding and Reform: HB 656, *available at* http://www.juliehamos.org/transit/news/newsitem.aspx?newsitemid=163.

from Congress, the costs inherent in an expanded reading of §1146(c) reinforce the conclusion that federal courts construing the statute must respect the integrity of state tax law and fiscal policy, which the court below failed to do.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

STATE OF FLORIDA DEPARTMENT OF REVENUE,

PETITIONER,

v.

PICCADILLY CAFETERIAS, INC.,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, HAWAII, IOWA, KANSAS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, OHIO, OKLAHOMA, PENNSYLVANIA, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING, AND THE CITIES OF CHICAGO, NEW YORK, AND PHILADELPHIA, AND THE CITY & COUNTY OF SAN FRANCISCO AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether § 1146(c) of the Bankruptcy Code, which exempts from stamp or similar taxes any asset transfer "under a plan confirmed under section 1129 of the Code," applies to transfers of assets occurring prior to the actual confirmation of such a plan?

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INTEREST OF THE *AMICI CURIAE*

At issue in this case is whether the tax exemption found in the Bankruptcy Code at 11 U.S.C. § 1146(c) applies to property sales undertaken before a chapter 11 plan is confirmed, or whether the exemption is limited to transfers made pursuant to a confirmed plan.[1] This is an issue of critical importance to state, county, and municipal taxing authorities. Section 1146(c) exempts principally the real estate transfer tax,[2] and thirty-seven States—at the state, county, and/or municipal level—impose such a tax on the recording of deeds, mortgages, and/or lease assignments.[3] While this tax is usually a small percentage of the consideration paid (typically 1% or less), it accounts for billions of dollars in revenue to

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[1] The Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, Pub. L. No. 109-8, § 719(b)(3)(B), 119 Stat. 133, deleted former sub-sections (a) and (b) of § 1146, and former subsection (c) is now sub-section (a). Because this case predates the change in the statute, *amici* will refer to the applicable section as § 1146(c), consistent with the convention adopted in petitioner's brief. Pet. Br. 2 n.1.

[2] Debtors' counsel regularly file motions seeking to extend the exemption to cover sales and use taxes, UCC filing fees, gains taxes, and other taxes and fees. See Karen Cordry, *The Incredible Expanding Section 1146(c)*, 21 Am. Bank. Inst. J. 10 (Dec.–Jan. 2003).

[3] A list of these States and the applicable tax rates is available at www.realtor.org/smart_growth.nsf/docfiles/TransferTaxRates(8-05).pdf.

state and local governments nationwide.[4] As a result, if this Court were to affirm the Eleventh Circuit's determination that pre-confirmation sales are entitled to the § 1146(c) exemption, state and local governments would face a substantial decrease in tax revenue, undermining their ability to provide valuable services.

Moreover, if the Court were to adopt the standard contemplated by the Eleventh Circuit—under which the availability of the exemption turns on whether the transaction at issue is determined retroactively to have been "necessary to the consummation of a confirmed plan of reorganization," Pet. App. 9a—courts, debtors, and state and local taxing authorities would be forced to take on substantial new burdens. Rather than merely determine whether a transaction is authorized by an existing, confirmed plan of reorganization—the interpretation adopted by the Third and Fourth Circuits, see *In re Hechinger Inv. Co.*, 335 F.3d 243, 257 (3d Cir. 2003); *In re NVR, LP*, 189 F.3d 442, 457-458 (4th Cir. 1999)—all parties would have to undertake a far more difficult and amorphous inquiry, on a case-by-case basis and without any guidance from

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[4] For example, transfer tax collections for fiscal year 2006 for the State of Washington were $1.010 billion (dor.wa.gov/docs/reports/2007/Tax_Reference_2007/50reet.pdf at p. 202), for the State of Florida were $4.105 billion (dor.myflorida.com/dor/tables/f2fy2006.xls), and for the City of New York were $1.352 billion in mortgage recording taxes and $1.305 billion in conveyance of real property taxes (www.comptroller.nyc.gov/bureaus/acc/cafr-pdf/cafr2006.pdf at p. 260).

the language of the statute, into whether the transaction is "necessary" to the debtor's ability to propose and confirm a plan. Moreover, given the subjective nature of this analysis, the decision either way on whether a transaction is exempt is likely to engender disputes, litigation, and appeals, exacerbating the burdens on state and local governments and increasing the costs and time expended by all parties to the proceeding.

STATEMENT

On October 28, 2003, Piccadilly Cafeterias, Inc. ("Piccadilly") entered into an asset purchase agreement with Piccadilly Acquisition Corporation ("PAC"), in which the latter agreed to acquire Piccadilly's assets (chiefly property) in exchange for $54 million. Pet. App. 2a. The next day, Piccadilly filed a chapter 11 bankruptcy petition and a motion under § 363(b) of the Bankruptcy Code for an order authorizing an auction of Piccadilly's assets, using PAC's offer as the opening, minimum bid. *Id.* at 2a, 13a & n.6.[5] Piccadilly's motion also asked the bankruptcy court to declare the resulting sale exempt from stamp taxes under § 1146(c). *Id.* at 2a.

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[5] Section 363(b) authorizes "the trustee, after notice and a hearing, [to] use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Although § 363(b) refers to "the trustee['s]" power to use, sell, or lease property, under chapter 11, a debtor-in-possession (like Piccadilly here) has most of the powers of a trustee, including the latter's § 363(b) authority. See *id.* §§ 1107(a), 1108.

The bankruptcy court entered an order on December 4, 2003, approving the bidding process and establishing an auction date. *Id.* at 2a-3a. The winner at auction was Piccadilly Investments, LLC (no relation to Piccadilly or PAC), with a bid of $80 million. *Id.* at 3a. On February 13, 2004, the bankruptcy court approved the sale and held, over the objection of the State of Florida ("Florida"), that the sale was exempt from stamp taxes under § 1146(c). *Id.* at 2a-3a. One month later, the bankruptcy court entered an amended order approving the sale and denying Florida's motion to reconsider the sale order, and the sale closed on March 16, 2004. *Id.* at 3a.

Piccadilly filed its initial proposed liquidation plan ten days later, and subsequently submitted an amended plan, to which Florida objected. *Ibid.* Florida also initiated an adversary proceeding seeking a declaration that § 1146(c) did not exempt the asset sale from stamp taxes. *Ibid.* On October 21, 2004, the bankruptcy court confirmed the amended liquidation plan, over Florida's renewed objection. *Ibid.*

In the adversary proceeding, both Florida and Piccadilly moved for summary judgment. *Ibid.* The bankruptcy court ruled that the § 1146(c) exemption applied—although the sale occurred well before the plan was proposed and at least seven months before it was confirmed—on the ground that the sale was necessary for the eventual consummation of the plan. *Ibid.*

The district court, and then the Eleventh Circuit, affirmed. *Id.* at 3a-4a, 9a. The court of appeals rejected the argument that § 1146(c) exempts only post-confirmation sales, holding that even pre-

confirmation transactions take place "under a plan confirmed" whenever they are "necessary to the consummation of a confirmed plan." *Id.* at 9a. This Court granted Florida's certiorari petition.

SUMMARY OF ARGUMENT

In extending the tax exemption found in § 1146(c) to pre-confirmation sales "necessary to the consummation of a confirmed plan of reorganization," Pet. App. 9a, the Eleventh Circuit relied on what it deemed the "practical realities" of chapter 11 reorganization, as well as certain ambiguities that it identified in the statute, *id.* at 7a-8a. Its analysis fails for several reasons.

First, although the Eleventh Circuit indicated that expansion of the § 1146(c) exemption to pre-confirmation sales would serve Congress' purported purpose of encouraging reorganization of financially distressed companies, Pet. App. 6a, 8a, it is impossible to divine any such congressional intent for this exemption, which applies equally to both liquidations and reorganizations that occur pursuant to a confirmed plan. Moreover, even if Congress did intend § 1146(c) to encourage reorganizations, the court of appeals was incorrect to conclude that expanding the tax exemption to pre-confirmation sales will further this goal. To the contrary, the "practical realities" of chapter 11 demonstrate that the current trend among debtors is to use chapter 11 to liquidate rather than to reorganize, and that the Eleventh Circuit's approach will only give them an added incentive to do so. And to the extent that debtors do use chapter 11 for reorganization, there is no reason to believe that financially beneficial transactions upon which

reorganizations depend will not occur absent expansion of the § 1146(c) exemption and the minimal benefit it provides to debtors (and their purchasers).

Second, the Eleventh Circuit's view that the § 1146(c) exemption applies to both pre- and post-confirmation transfers is belied by that provision's own language, the related statutes upon which § 1146(c) was modeled, and established canons of statutory construction. In particular, as Florida ably explains in its brief, § 1146(c) expressly limits its scope to transfers "under a plan confirmed," that is, it exempts only those transfers authorized by a confirmed plan. Pet. Br. 12-21. The use of the past tense in this phrase should not be overlooked, as the Eleventh Circuit did, and the word "confirmed" is unambiguous and means exactly what it says: the plan must already be "confirmed" at the time the instrument of transfer is made or delivered. Moreover, this language is virtually identical to that found in § 267 of the Bankruptcy Act and § 4382(b) of the Internal Revenue Code—both of which established tax exemptions that extended only to transactions occurring *after* plan confirmation. Because § 1146(c) uses the same language as these provisions, settled rules of statutory construction require that the three statutes be read consistently.

Rules of interpretation also require that Congress act clearly when it abrogates state or local taxing authority, and there is no clear indication here that Congress intended any such abrogation, much less that it meant to expand the § 1146(c) exemption to all sales "necessary" to plan consummation—an analytical factor that the Eleventh Circuit grafted onto the

statute's plain language. Moreover, as noted above, the practical difficulties with applying the Eleventh Circuit's expansive interpretation are strong evidence that the statute was never meant to be read as the court of appeals did. To the contrary, had Congress intended to extend the exemption to transfers necessary to plan confirmation, it easily could have worded the statute in a way that would have made its intentions clear—and that would answer many of the difficult questions of line-drawing that arise under the Eleventh Circuit's view.

ARGUMENT

I. Limiting The § 1146(c) Exemption To Post-Confirmation Transfers Will Not Frustrate Plan Confirmation Or Otherwise Impede Reorganization.

The Eleventh Circuit determined that § 1146(c) should be read to make Piccadilly's pre-confirmation asset sale tax exempt on the view that "'Congress's apparent purpose in enacting section 1146 was to facilitate reorganizations through giving tax relief.'" Pet. App. 6a (quoting *In re Jacoby-Bender, Inc.*, 758 F.2d 840, 841 (2d Cir. 1985)); see also *Hechinger*, 335 F.3d at 259 (Nygaard, J., dissenting) ("We should read 1146(c) to facilitate reorganization, not impede reorganization."). In so doing, the court of appeals relied on "the principle that a remedial statute such as the Bankruptcy Code should be liberally construed," Pet. App. 8a—even to the point of being extended to cover situations where there was *no* reorganization. The Eleventh Circuit's belief that an expansion of the § 1146(c) exemption is necessary to encourage reorganizations is misplaced.

Like many debtors who file under chapter 11, Piccadilly never intended to reorganize. On October 28, 2003, Piccadilly negotiated and executed an agreement for the sale of nearly all of its assets to PAC with the understanding that Piccadilly then would file for bankruptcy and propose an immediate sale through a court-approved process. Pet. App. 2a. As planned, Piccadilly filed for bankruptcy the next day and sought both authority under § 363(b) to sell its assets pursuant to a judicial auction, and a declaration that the sale would be exempt from transfer taxes under § 1146(c). *Ibid.* The auction proceeded apace, and the sale closed in March. *Id.* at 2a-3a. Only afterward did Piccadilly even file its proposed liquidation plan, and it was not until October 2004, seven months after the sale closed, that the court actually confirmed the plan. *Id.* at 3a. Thus, reorganization was never among Piccadilly's goals.

The circumstances giving rise to this case are emblematic of current trends in bankruptcy proceedings. Chapter 11, once a powerful tool by which corporations reorganized as going concerns, is now often used as a means to dispose of corporate assets. "Corporate reorganizations have all but disappeared. Giant corporations make headlines when they file for Chapter 11, but they are no longer using it to rescue a firm from imminent failure. Many use Chapter 11 merely to sell their assets and divide up the proceeds." Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 Stan. L. Rev. 751, 751 (2002); see also Hon. J. Vincent Aug, *et al.*, *The Plan of Reorganization: A Thing of the Past?*, 13 J. Bankr. L. & Prac. 4 Art. 1 (2004) ("restructuring the business as a going-concern is no longer the primary focus of chapter 11"); Douglas

G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 Stan. L. Rev. 673, 674 (2003) (in 84% of large chapter 11 cases filed in 2002, investors had a deal in hand when the case was filed, or used the case to sell assets).

In addition, and also well illustrated by this case, the modern practice is for corporations to rely, as Piccadilly did, on § 363(b)—rather than a confirmed plan—to sell their assets. Under the Bankruptcy Code, a chapter 11 debtor may sell or transfer the bankruptcy estate's assets outside of the ordinary course of business in either one of two ways. First, the debtor may act pursuant to § 363(b), which empowers "the trustee, after notice and a hearing, [to] use, sell, or lease * * * property of the estate." 11 U.S.C. § 363(b)(1).[6] This can be an expedient route. A motion to sell assets under § 363(b) requires only 20 days' notice to creditors and other interested parties, see Fed. R. Bankr. P. 2002(a)(2), and sale motions are generally approved if the court finds that the sale falls within the debtor's sound business judgment, see, *e.g.*, *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983).

Alternately, the debtor may sell or transfer estate assets pursuant to a confirmed plan. To obtain a confirmed plan, however, the debtor must undertake a number of steps. First, it must propose a plan that sets out its method of implementation, which may include the "sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution

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[6] As we explain, *supra* note 5, a debtor-in-possession has most of the powers of a trustee, including the trustee's authority under § 363(b).

of all or any part of the property of the estate among those having an interest in such property of the estate." 11 U.S.C. § 1123(a)(5)(D). Next, the debtor must prepare and circulate a court-approved disclosure statement that provides all interested parties with sufficient information to make an informed decision whether to accept or reject the plan, see *id.* § 1125, and solicit and obtain sufficient votes to sustain the plan, see *id.* § 1126. Finally, the debtor must establish that the plan meets all requirements for confirmation, including that it was proposed in good faith, is in the best interests of creditors, and meets the absolute priority rule. See *id.* § 1129.

Of these two options for disposing of estate assets, debtors generally prefer § 363(b) over plan confirmation. As the above description makes plain, the process for selling estate assets through a confirmed plan has more procedural steps and creditor protections than the § 363(b) sales process. Section § 363(b) also affords debtors greater flexibility: after the asset sale, the debtor still retains the power to propose a chapter 11 plan or convert the case to one under chapter 7. See *id.* § 1112(a).

Asset purchasers also often prefer § 363(b). The process is streamlined, but still provides them with many protections that they would not enjoy if they bought the assets outside of bankruptcy. For example, the purchaser in a § 363(b) sale may take title to an asset free and clear of all "interests" of other parties (which courts have interpreted to include liens, encumbrances, and successor liability claims), without waiting for plan confirmation. See 11 U.S.C. §363(f)

and (m); see also *In re Trans World Airlines, Inc.*, 322 F.3d 283, 288-293 (3d Cir. 2003).

Although § 363(b) sales were initially resisted by some courts and have been the subject of scholarly criticism,[7] the clear current trend among bankruptcy courts is to allow chapter 11 debtors to use § 363(b) to make sales, even bulk sales involving substantially all of the estate assets. See generally Elizabeth B. Rose, *Chocolate, Flowers & § 363(b): The Opportunity for Sweetheart Deals Without Chapter 11 Protections*, 23 Emory Bankr. Dev. J. 249, 269 (2006) ("Empirically, the number of § 363 preplan sale motions for all or

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[7] Courts and commentators have expressed concerns about the § 363(b) process because, while benefitting debtors and the buyers of their assets, it deprives creditors of many of the protections that the plan confirmation process provides, including the requirement of a judicial finding that the plan is proposed in good faith and is in the creditors' best interests. See generally 11 U.S.C. § 1129. Recognizing this potential to circumvent creditor protections, some courts initially disapproved of § 363(b) sales where the anticipated transaction was of such a size and nature as to have a major impact on the plan process. See, *e.g.*, *In re Continental Airlines, Inc.*, 780 F.2d 1223, 1227-1228 (5th Cir. 1986) ("[I]f the debtor were allowed to reorganize the estate in some fundamental fashion pursuant to § 363(b), creditor's rights * * * might become meaningless."). For the same reason, commentators, too, have criticized the use of § 363(b) to authorize bulk sales. See, *e.g.*, Elizabeth B. Rose, *Chocolate, Flowers, & § 363(b): The Opportunity for Sweetheart Deals Without Chapter 11 Protections*, 23 Emory Bankr. Dev. J. 249, 275-283 (2006) (discussing abuses inherent in § 363(b) sale process and arguing for more transparency and supervision).

substantially all of the debtor's assets dramatically increased in the 1990s and preplan sales enjoy even more use since 2000."); Harvey R. Miller & Shai Y. Waisman, *Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?*, 78 Am. Bankr. L.J. 153, 194-195 (Spring 2004) (listing 22 large corporate debtors that used § 363(b) to sell all or substantially all of their assets outside of a confirmed plan). Given the prevalence of § 363(b) sales, one scholar has even suggested that Congress amend the Bankruptcy Code to establish a formal process for the non-plan sale of substantially all of a debtor's assets, as a means of obtaining greater consistency and predictability in the process. See George W. Kuney, *Let's Make It Official: Adding an Explicit Preplan Sale Process as an Alternative Exit from Bankruptcy*, 40 Hous. L. Rev. 1265, 1287-1305 (2004).

In short, it has become the norm and not a rare exception for chapter 11 filings to result in liquidations through a quick bulk sale of estate assets under § 363(b). Accordingly, the Eleventh Circuit's view that an expansion of the § 1146(c) exemption to pre-confirmation transfers is necessary to encourage reorganizations is not well founded. Initially, for all of the reasons noted above that underlie the current trend toward using chapter 11 to dispose of assets under § 363(b), there are already powerful incentives to engage in these pre-plan transactions, even without a minor added tax advantage. More fundamentally, however, the fact that debtors use chapter 11 less and less as a means to reorganize undercuts the argument that pre-plan tax exemptions are needed to foster reorganization—or that they do so. As this case

illustrates, chapter 11 can be used to liquidate as well as to reorganize, and there is nothing in § 1146(c) that limits the tax exemption to *reorganization* plans. Under the Eleventh Circuit's view, a debtor like Piccadilly, which uses chapter 11 to dispose of assets before liquidating, rather than reorganizing, would receive all the benefits of a tax exemption that the court of appeals deemed necessary to encourage reorganization. And by allowing such benefits, this view could be said to encourage liquidations as much as, if not more than, reorganizations.

Nor is there reason to conclude, in those cases where chapter 11 is being used to reorganize, that reorganizations will not occur absent extension of the § 1146(c) exemption to pre-confirmation sales. Indeed, the experience has been to the contrary in the Fourth Circuit, where the court of appeals made clear years ago that the exemption extends only to post-confirmation transactions. See *NVR*, 189 F.3d at 458. In *Hechinger*, the Third Circuit, expressly rejecting the view that limiting § 1146(c) to post-confirmation sales "would frustrate reorganization," noted that the Fourth Circuit had adopted this limitation four years earlier in *NVR*, and there was no evidence that the rule had caused "dire effects" in that circuit. *Hechinger*, 335 F.3d at 254 n.5.

The Fourth Circuit's experience should come as no surprise. The reality is that § 1146(c)'s exemption will almost surely have little practical effect on a debtor's willingness and ability to reorganize. Real estate transfer taxes are quite small as a share of the sale price—in most cases less than 1% and often far lower. See www.realtor.org/smart_growth.nsf/docfiles/

TransferTaxRates(8-05).pdf.[8] As a result, parties are unlikely to forego financially beneficial transactions merely because the § 1146(c) exemption is unavailable. In fact, we know of no reported cases finding that but for the availability of the exemption, an asset sale would not have gone forward.

Nor are there any reported cases finding that a debtor was unable to confirm a plan because it had to pay the transfer tax on a pre-confirmation sale. Indeed, in both *NVR* and *Hechinger*, the taxes were either paid or escrowed pending confirmation and the sales consummated long before confirmation. That parties are willing to complete these transactions with no assurance that the taxes will be released from escrow or refunded to the debtor is strong evidence that the viability of the sales will not turn on whether a 1% tax must be paid. This is underscored by the fact that there is no exemption for those transactions from other types of taxes, such as sales or capital gains taxes, which are assessed at much higher percentages (as much as 15% for the federal capital gains tax, for instance).

Moreover, there are valid reasons to limit the exemption to post-confirmation transfers. If the purpose of § 1146(c) is to facilitate reorganization, it is logical to extend its exemption only to those who have succeeded in confirming a plan. While not all plans are for reorganizations, it is at least true that all reorganizations require a confirmed plan, and Congress

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[8] For example, Illinois's real estate transfer tax is 0.1% of the consideration paid for the property. See 35 ILCS 200/31-15 (2006).

was plainly aware that many chapter 11 debtors would fail to obtain confirmed plans. See *In re Jacoby-Bender, Inc.*, 34 B.R. 60, 62 (Bankr. E.D.N.Y. 1983). By limiting the exemption to transfers under a confirmed plan, Congress created an incentive for early confirmation, so that more transfers are made under the confirmed plan. Absent that incentive, the debtor can arrange an early sale of the assets with no particular motive to move promptly to confirmation.

With that understanding, it was sensible for Congress to balance the advantages of a tax break for debtors confirming plans against the injury to state and local taxing authorities from the loss of revenue. There is nothing illogical about Congress choosing to limit the extent to which it deprived States and localities of the transfer taxes upon which they heavily rely in order to benefit debtors. The balance that § 1146(c) strikes is a sensible one: tax benefits are available, but only after the debtor achieves a confirmed plan, with all of the substantive and procedural protections that the confirmation process ensures.

In the final analysis, therefore, the argument that a narrow construction of § 1146(c) would frustrate the purpose of the exemption must fail because there is no evidence that such a construction will impede reorganizations, much less that Congress intended to provide wide-ranging tax relief to any sale or transfer, regardless of when it took place, that might assist in the eventual confirmation of a chapter 11 plan.

II. Settled Rules Of Statutory Construction That § 1146(c)'s Exemption Is Reserved For Post-Confirmation Transfers.

The first rule of statutory construction is that language must be given its plain meaning. See, *e.g.*, *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms") (internal quotation marks and citation omitted). Courts presume that Congress "says in a statute what it means and means in a statute what it says there." *Ibid.* (internal quotation marks omitted). In its brief, Florida details why the proper construction of § 1146(c)—particularly its language limiting the tax exemption to transfers "under a plan confirmed"—is that it exempts only those transfers authorized by, and following confirmation of, a plan. Pet. Br. 12-21. *Amici* adopt these arguments.

But even if the Court were to conclude that § 1146(c) is ambiguous, the Eleventh Circuit's reading still fails for at least two reasons. First, related statutes reveal Congress's clear intent to limit § 1146(c) to post-confirmation sales. Second, it is impossible to reconcile the court of appeals' interpretation with the established canon that tax exemptions, particularly federal exemptions from state taxes, are construed narrowly. We consider these reasons in turn.

A. Section 1146(c) Must Be Construed In Harmony With Related Statutes.

The Eleventh Circuit's interpretation of § 1146(c) cannot be squared with congressional intent as manifest

in related federal laws. There has long been federal legislation exempting from taxation the issuance of securities or the making or delivery of instruments of transfer under a confirmed bankruptcy plan. The first such law was § 77B(f) of the Bankruptcy Act of 1934, which exempted from federal transfer taxes "[t]he issuance, transfers, or exchanges of securities or making or delivery of conveyances to make effective any plan of reorganization confirmed under the provisions of this section." Pub. L. No. 296, 48 Stat. 911, 919 (1934). In 1938, Congress replaced § 77B(f) with § 267, and thereby extended the exemption to both state and federal taxes. See Pub. L. No. 75-696, 52 Stat. 840, 903-904 (1938) ("The issuance, transfer, or exchange of securities, or the making or delivery of instruments of transfer under any plan confirmed under this chapter, shall be exempt from any stamp taxes now or hereafter imposed under the laws of the United States or any State."); see generally 6A *Collier on Bankruptcy* ¶ 15.08, at 836-837 (14th ed. 1977). Meanwhile, the Internal Revenue Code of 1954 included a parallel exemption from federal documentary stamp taxes on the issuance, transfer, or exchange of securities or the making, delivery, or filing of conveyances in corporate and railroad reorganizations confirmed under the Bankruptcy Act or approved in equity receivership proceedings, so long as the transfers occurred within five years of the confirmation or approval. See 26 U.S.C. § 4382(b) (1972) (repealed).

As relevant here, when Congress enacted the Bankruptcy Reform Act of 1978, the stamp tax exemption provisions in § 1146(c) were "modeled after section 267 of the Bankruptcy Act * * *." H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 281 (1978), 1978

U.S.C.C.A.N. 5963, 6238. Indeed, § 1146(c) employs virtually the same language as § 267 in exempting from stamp taxes transfers "under a plan confirmed." Critically, § 4382(b) of the Internal Revenue Code also corresponded to § 267. See 6A *Collier on Bankruptcy* ¶ 15.08, at 837-840. And while there are no reported decisions construing either § 267 or § 4382(b), the leading contemporary bankruptcy treatise makes clear that they did "not extend any exemption to transactions (that is, transfers, issuance, etc.) *which occur prior to confirmation of the plan and which are merely preparatory steps.*" 6A Collier on Bankruptcy ¶ 15.08, at 840 (emphasis added).

In fact, § 4382(b) made this plain on its face. Its language limits the exemption to transactions "only if the issuance, transfer, or exchange of securities, or the making, delivery, or filing of instruments of transfer or conveyances, occurs within 5 years from the date of such confirmation, approval, or change." 26 U.S.C. § 4382(b) (1972). The five-year period logically must refer solely to time elapsed since the confirmation date; if it were to include the five years before confirmation, it would sweep in transactions that occurred well before the debtor even filed for bankruptcy, which could not possibly have been intended. Moreover, because § 4382(b) and § 267 overlap, they must be—and have been—read harmoniously, to provide that their stamp tax exemptions are applicable only to post-confirmation transfers. Likewise, because Congress modeled § 1146(c) on § 267, and used virtually identical wording in both, they should be given the same construction. See *Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972) (statutes in pari materia are to be read consistently).

B. If Congress Had Intended To Extend § 1146(c) To Pre-Confirmation Sales, Congress Would Have Done So Clearly.

Not only is the Eleventh Circuit's expansion of the § 1146(c) exemption inconsistent with the long-established interpretation of similar statutes, but that court's reading of § 1146(c) fails on another, independent ground—the court improperly ignored the requirement that it narrowly interpret federal exemptions from state taxation and, worse still, grafted onto § 1146(c) language not found in the statute.

Under the Eleventh Circuit's view, the § 1146(c) exemption applies to any transfer, regardless of when it occurs, if the transfer is "necessary to the consummation of a confirmed plan." Pet. App. 9a. This sweeping interpretation of the statutory language cannot be reconciled with prior decisions of this Court, which not only require tax exemptions generally to be narrowly construed, see, *e.g.*, *United States v. Centennial Savs. Bank FSB*, 499 U.S. 573, 583 (1991), but strictly read federal laws that interfere with a state's tax scheme, see, *e.g.*, *Nat'l Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582, 590 (1995). This Court has long held in the bankruptcy context, specifically, that if Congress intended to exempt a debtor or trustee from applicable state or local taxes, "[t]he intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." *Swarts v. Hammer*, 194 U.S. 441, 442 (1904) (no exemption from state and local property taxes); see also *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 853-854 (1989) (no

exemption from sales and use taxes). Nothing on the face of § 1146(c) evinces a clear, congressional purpose to extend its exemption to pre-confirmation sales that are essential to a later plan. See *NVR*, 189 F.3d at 459 (Wilkinson, C.J., concurring in part and concurring in the judgment) (construing § 1146(c) to apply only to post-confirmation sales "[b]ecause concerns of federalism require the narrower interpretation").

If Congress had intended to extend § 1146(c) to pre-confirmation transfers that are arguably essential to a later plan, it would be expected to have said so expressly. In particular, under the Eleventh Circuit's view, the tax exemption, as applied to pre-confirmation sales, must be either retroactive or conditional—either the tax is due at the time of the sale with a rebate available to the debtor if, following confirmation, the sale is deemed "necessary" to the plan, or the tax is due conditionally but not payable until it becomes clear that there will be no confirmed plan or the sale will be "unnecessary" to plan confirmation. If Congress meant to create such a process, it readily could have made that clear.

For example, Congress might have exempted transactions "necessary to the confirmation of a plan that has been or is ultimately confirmed." Had it done so, it might also have included some definition of what made a transaction "necessary." Likewise, Congress might have provided that "[t]he amount of any tax conditionally exempted pending confirmation shall be escrowed until a plan is confirmed or the case is converted or dismissed," or, alternatively, that "[t]axes paid on pre-confirmation transfers necessary to plan confirmation shall be rebated upon confirmation of the

plan." The Eleventh Circuit fails even to acknowledge, much less resolve, these issues.

Not only did Congress make no mention of expanding the § 1146(c) exemption to sales "necessary to the consummation of a confirmed plan," it similarly failed to address the applicability of the exemption to § 363(b) sales. This silence is telling. Piccadilly engaged in a bulk sale of its assets pursuant to § 363(b), and thus avoided the time-consuming process of proceeding pursuant to a confirmed plan. Only later, after the sale closed, was a liquidating plan proposed and eventually confirmed. As we have explained, Piccadilly's approach is the prevalent one: chapter 11 is used far more often for liquidations than for reorganizations, and, moreover, the sale of assets in chapter 11 is more likely undertaken pursuant to § 363(b) than through the plan confirmation process.

Notably, however, although § 1146(c) expressly anticipates that its exemption will apply to sales associated with a confirmed plan, it says nothing about whether that exemption extends to § 363(b) sales. There can be no question that Congress was aware that § 363(b) provides chapter 11 debtors with an alternative means of selling assets. Under these circumstances and in combination with the mandate that courts interpret federal exemptions to state taxation narrowly, it cannot be assumed that Congress intended that the exemption apply where, as here, a debtor sells the majority of its assets pursuant to § 363(b).

In short, § 1146(c)'s plain language limits the tax exemption to post-confirmation sales. Even if the provision were ambiguous, however, related statutes and the long-established requirement that tax

exemptions be construed narrowly require reversal of the Eleventh Circuit's decision.

CONCLUSION

The decision of the Eleventh Circuit should be reversed.

Respectfully submitted.

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